# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1956

# No. 211

TEXTILE WORKERS UNION OF AMERICA,
PETITIONER,

*vs.*

LINCOLN MILLS OF ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION**

No. 3124

TEXTILE WORKERS UNION OF AMERICA, CIO, Plaintiff,

versus

LINCOLN MILLS OF ALABAMA, a corporation, Defendant

COMPLAINT—Filed January 14, 1955

I

Plaintiff, a labor union, is an unincorporated association whose duly authorized agents are engaged in representing, in the Northern District of Alabama, members who are and have been employees of defendant in an industry affecting commerce within the meaning of the Labor Management Relations Act of 1947. Defendant is a corporation doing business in and having its principal place of business in Huntsville, Madison County, Alabama, within this District. Defendant has annually purchased large amounts of raw materials from and shipped large amounts of finished products to points outside the State of Alabama. This is a suit based upon violation of and seeking specific performance of a contract between a labor organization representing employees in an industry affecting interstate commerce as [fol. 2] defined in said Act, as more fully hereinafter appears, and arises under said Act regulating commerce. (29 USC 185; 28 USC 1337.)

II

On or about June 27, 1953, defendant executed a contract with plaintiff in writing. This contract covered and was executed by plaintiff as collective bargaining representative for and agent of certain employees of defendant at its Huntsville, Alabama, plant, including Cloth Rollers, Card Grinders Helpers, Slubber Hands #2 and 4 Card Room, Sweepers, Transfer Man, Can Dumper and Roving Marker, Frame Fixers, Fales and Jenks Twister Tenders and Def-

fers, Warp Twister Creeler Hands, Warp Twister Deffers. A copy of said contract is attached hereto as Exhibit "A."

III

In accordance with the provision of said contract, grievances were filed upon behalf of employees covered by that contract and copies of said grievances are attached hereto as Exhibit "B" and through "K." Said grievances were not adjusted under the provisions of Step 2 and were not adjusted within fifteen days after their presentation under Step 3 of Article VIII of said contract entitled "Adjustment of Grievances." Plaintiff duly gave timely written notice in accordance with Article IX Paragraph (F) of said contract thereby submitting said grievances to arbitration. Defendant has failed and refused to confer and endeavor to agree upon the selection of an Arbitrator. Plaintiff has duly requested the American Arbitration Association to submit a list of five qualified Arbitrators and defendant has failed and refused to participate in the selection of an impartial Aribtrator and now refuses to [fol. 3] submit said grievances to arbitration as required by said Article IX (E).

By the above described omissions and breaches of contract on the part of defendant, the employees to whom said grievances applied and who are represented by the plaintiff as their statutory sole collective bargaining agent and in this suit have not received the benefits of the above collective bargaining contract, all to their substantial and irreparable injury.

IV

Plaintiff and the employees whom it represents are without adequate remedy at law and will suffer immediate continuing and irreparable injury, loss damage unless defendant is ordered specifically to perform the above contract, and in particular Article IX (F) thereof, and is restrained from continuing to refuse to carry out its obligations thereunder.

V

Plaintiff in behalf of itself and the employees whom it represents has requested defendant to perform its obliga-

tions under said Article IX (F) but defendant has refused and failed to so perform, as alleged above.

VI

Plaintiff submits to jurisdiction of this Court and offers to do equity.

Wherefore, plaintiff demands;

1. That its right and the right of the employees whom it represents under Article IX (F) of the collective bargain-
[fol. 4] ing contract with respect to arbitration of said grievances be determined, and that its incidental damages and the incidental damages of employees represented by it as a result of defendant's violations of the terms of said contract, be fixed.

2. That defendant specifically be required to perform Article IX (F) of said contract particularly with respect to said unresolved grievances which are Exhibits "B" through "K" hereto.

3. That defendant be restrained from in any manner failing or refusing to perform its obligations under said Article IX (F) and particularly with respect to said grievances.

4. Incidental damages in the sum of Twenty-five Thousand Dollars ($25,000.00) is the amount of damages sustained by plaintiff and the employees whom plaintiff represents.

5. That defendant be temporarily restrained and enjoined by the injunction of this Court and in the form prayed above, and that upon appropriate determination of this cause said injunction be made final.

6. That plaintiff may have such other and further relief as by this Honorable Court may be deemed just and equitable in the premises, all at defendant's cost.

7. If specific performance is not granted plaintiff, that judgment be rendered against defendant in the sum of Twenty-five Thousand Dollars ($25,000.00).

[fol. 5] 8. That appropriate process may issue commanding defendant to answer this Bill of Complaint and to abide

by such decree as this Honorable Court may make in the premises.

Textile Workers Union of America, CIO, By (S.) Benjamin Wyle, (Benjamin Wyle), General Counsel.

99 University Place,
New York, New York.

Cooper, Mitch & Black, By (S.) Jerome A. Cooper.

1329 Brown-Marx Building,
Birmingham, Alabama.

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EXHIBIT "A" TO COMPLAINT

Copy of Agreement dated June 27, 1953

Agreement
(1953-1954)

Lincoln Mills of Alabama

and

Textile Workers Union of America, CIO.
(Local Union No. 230)

June 27, 1953

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Agreement,

Agreement entered into this 27th day of June, 1953, by and between Lincoln Mills Of Alabama (hereinafter called the "Employer"), party of the first part; and Textile Workers Union Of America, *Cio,* (hereinafter referred to as the "Union"), party of the second part.

[fols. 9-10] Witnesseth:

In consideration of the mutual covenants herein contained, the parties hereto agree as follows:

## Article 1

## Purpose And Scope Of The Agreement

The purpose of this Agreement is to provide orderly collective bargaining relations, to secure prompt and equitable

disposition of grievances, to establish fair wages, hours and other working conditions, to maintain a harmonious relationship between the Union and the Employer, and to prevent strikes and lockouts.

## Article II

## Recognition and Union Security

(A) Recognition: The Employer hereby recognizes and agrees to deal with the Union as the exclusive representative for the purposes of collective bargaining with respect to wages, rates of pay, hours of work and other conditions of employment for all employees, excluding executives, office and clerical employees, timekeepers, overseers, foremen and second hands.

The terms "employee" and "employees" as used in this Agreement, refer to each employee and all employees of the Employer for whom the Union is recognized as the exclusive representative for the purpose of collective bargaining in accordance with this Article.

[fol. 11]

## Article IV

## Wages

(A) Minimum Wage: It is agreed that each employee, except learners, shall be granted and paid for each day's work, an amount not less than one dollar three and one-half cents ($1.035) revised upward or downward according to this Agreement, multipled by the number of straight-time hours worked on that day in addition to all overtime and premium pay due the employee.

(B) Learners: The starting rate for new inexperienced employees shall be eighty-eight (88) cents per hour [fol. 12] for the first six (6) weeks of employment and one dollar three and one-half cents ($1.035) per hour thereafter, as a minimum rate. Learners placed on piece or incentive rate jobs during the learnings or the learner rate provided for in this Section, whichever is greater.

(C) Wage Rate Schedule: The hourly rates and expected average earnings rates for piece rate workers which are set forth in a Schedule marked "B" attached hereto and made a part hereof shall prevail during the life or

this Agreement. Any new rates effected through negotiation or arbitration shall be reduced to writing and attached to Schedule "B" as an amendment thereto.

It is agreed between the parties that the Company shall always have the right to assign or reassign duties to hourly paid workers.

(D) Wage Revision: Either party hereto may at any time request a general revision upwards or downwards in rates of pay, and any such revision shall continue in effect until the termination of this Agreement or any renewal thereof unless changed by mutual agreement or under the provisions of this Section.

Requests for a revision under this Section shall be in writing and shall be mailed or delivered to the other party not less than sixty (60) days prior to the requested revision date. Upon the giving of such written notice, the parties shall immediately negotiate the request. In the event of a disagreement or dispute between the parties with respect to such revision, the Union and the employees shall have the right to strike and the Employer shall have the right to effect a general revision of rates of pay, or shut down. Any such action shall not be deemed to be in violation of [fol. 13] this *Arg*eement which shall continue in full force and effect.

No proposal for a general wage adjustment shall be made until at least four (4) months after the last general wage adjustment and no such adjustment shall take effect prior to the expiration of six (6) months after the last general wage adjustment. Proposal for wage adjustment subsequent to the first wage adjustment shall be governed by a similar procedure: viz: four (4) months elapse before a new proposal and six (6) months elapse before effective date of adjustment except by mutual consent.

(E) Transfers: Employees who are temporarily transferred for the convenience of the Employer to work on jobs other than their regular jobs, shall receive the rates of pay applicable thereto, or their regular rates, whichever are higher; and under no circumstances shall any employee suffer a loss of earnings as a result of such transfer.

(F) Equality: Women employees shall receive the same

rates of pay as apply to men employees where they perform the same work as is performed by men.

(G) Third Shift Premium: The regular rates of pay for time worked during the third shift hours shall be five (5) cents per hour above the regular day rate.

(H) Reporting Pay:

(1) Any employee (excluding extras not assigned temporarily to a job, part-time workers and learners) reporting for work on his regular shift, or at the request of the Employer, without prior notice that he shall not report, [fol. 14] and who is not put to work shall be paid two (2) hours' pay for reporting.

Any extra who is assigned to a temporary vacancy shall be deemed unassigned on the day the regular employee returns to work and will not be entitled to pay for reporting on that day. Similarly, any extra shall be deemed unassigned on any day on which another employee exercises seniority to displace him from a temporary vacancy and such extra will not be entitled to pay for reporting on that day.

Employees who are absent of their own volition on the previous regularly scheduled work day will not be entitled to the reporting pay.

(2) Each employee who starts working a scheduled shift shall be, guaranteed a minimum of four (4) hours' pay unless he quits or voluntarily lays off; or is laid off by reason of a close-down of the entire department, or an entire department, or an entire room, due to an emergency beyond the Employers control, in which case employee involved shall be paid for the time actually worked or paid for reporting, whichever is greater.

(I) Price Rate Provisions:

(1) The minimum guaranteed wage for all piece rate jobs shall be 90% of the agreed earnings rate for the job or the plant minimum whichever is higher, and shall be calculated on a weekly basis.

In order to be entitled to the above guaranteed wage, any employee without a regular job in the classification

must have earned the guaranteed wage for five (5) successive days worked in the classification.

[fol. 15] (2) The Employer shall not change any existing piece rates unless changes are made in materials, machines or equipment, methods or conditions. Improved motions and processes introduced by employees or increased skill shall result in change in rates. The Employer will indicate to the Union the reason for proposing charges in piece rates. No changes may be made except by mutual agreement or arbitration as hereinbefore provided.

(3) New piece rates shall yield earnings equal to or better than those existing at the job.

(4) Piece work employees' production and earnings (in departments where presently posted) shall be determined daily and posted in the department within twenty-four (24) hours.

(5) Downtime: Downtime will be paid in accordance with the practical prevailing in 1947 and 1948 and described in principle in statement of practice as set forth in Exhibit "C" of this Agreement.

Payment of downtime on piece rate operations shall not relieve the Employer of any obligations imposed upon it by this Agreement to maintain piece rates and/or standards at such levels as to enable an employee of average ability and efficiency to earn expected earnings.

(J) Wage Information: Upon the request of the Union, the Employer agrees to submit a list of the low, high and average hourly earnings, exclusive of overtime and bonus payments, of piece and/or incentive rate employees by job classification and the number of employees in each job classification. Such request shall not be made more frequently than once each quarter.

[fol. 16] The Employer will provide the Union, and keep up-to-date, a list of all piece rates in effect in the Mill.

The Employer will post in each department of the mill and keep up-to-date a list of all piece rates in effect in the department.

(K) Payment of Wages: Payment of wages shall be made on the job on Company time not later than the end of the Friday shifts of each week for work performed the

preceding week and shall be by par check with recognition for legitimate deductions, including Union dues and initiation fees.

## Article V

## Work Loans And Work Assignment

(A) It is mutually recognized and agreed that the best interests of and the economic security of the Employer and its Employees require that the Employer shall have and maintain reasonable and efficient workloads, machine assignments and work standards based on sound management, engineering principles and practices. In keeping with the foregoing, the Employer may from time to time revise and modify work assignments and/or piece rates and establish new work assignments or rates in accordance with recognized sound engineering principles and practices. It is agreed that routine, minor, or day to day changes in to be based on the full use of an employee's time during his work day, working at the normal operation pace of an average qualified employee with adequate allowance for fatigue and personal needs. The fatigue allowance will be enough so that the average employee can maintain his work [fol. 17] assignment day after day without injury to himself. It is also recognized that normal machine or material delays or interferences will be compensated for in the standard. The Union and the affected employees shall have the duty and responsibility to accept workloads, machine assignments and piece rates, either new or changed, established in keeping with the above principles, and to cooperate fully with the Employer in giving said work assignments and piece rates a fair test. The procedure which will be followed is as follows:

(B) The Employer shall, upon written notice have the right to change or modify existing work assignments or piece rates and to establish new assignments or piece rates within the principles set forth in Paragraph (A) above. It methods, processes, or facilities on hourly paid jobs shall not be regarded as work assignment changes within the meaning of this Article; nor shall routine changes or mechanical corrections necessary to carrying out a scheduled program in connection with piece workers be con-

sidered a work assignment change within the meaning of this Article.

As has been done under prior Agreements the Employer will furnish the Union such information as may be available in order that the Union be aware of the changes made by the Company and the basis therefor, and the Company will give the employees such instruction as is necessary.

It is further agreed that when the changes are made effective the employees will cooperate and perform to the best of their ability in order to give the change or modification a reasonable and fair test.

[fol. 18] The first four (4) weeks immediately following the effective date of change or installation will be considered a trial period. During the first four (4) weeks of this trial period, the employees will be paid not less than their former average hourly earnings as provided in Paragraph (D) of this Article. By mutual agreement, the trial period may be extended beyond the four-week period, with or without a guarantee of average earnings.

(C) Any affected employee or the Union may file a grievance within two (2) weeks after the end of the trial period. If no grievance has been filed at the end of that time, the change or modification shall be considered established. If the Union feels that a rate for the changed assignment or work load of an hourly paid worker is out of line with that paid on other jobs with comparable workloads or assignments, it may raise such question as a grievance if it cannot be adjusted by negotiations.

(D) Price rates may be fairly adjusted by the Employer in connection with work assignment changes. In such case the new rate shall be set to yield average hourly earnings for the group on the new work assignment which are not less than the average straight time hourly earnings of the group on the old work assignment for the last Social Security Quarter which precedes the notice of change, except in cases in which the workload is found to be clearly out of line with the workload standards of the Employer heretofore found satisfactory or with other satisfactory workloads in the plant.

(E) In the event of an arbitration in which the Em-

ployer presents detailed standards based on adequate studies, the Board of Arbitrators shall give major con-
[fols. 19-20] sideration to the Employer's standards and studies (and their adequacy as measured by Paragraph (A) of this Article) together with the Union's objections to the validity of said standards and studies. If they order a change in the work assignment or piece rates they shall do so by specific reference to the factors in the Employer's standards which are found to be out of conformity with Paragraph (A), or improper, and shall clearly state the basis of such findings.

(F) It is further agreed that the Board of Arbitration shall have the right to adjust compensation retroactive to the date of the change.

(G) Any dispute arising from the operation or interpretation of Article V shall be subject to the grievance procedure up to and including arbitration.

[fol. 21] Article VIII

Adjustment Of Grievances

(A) Procedure: Should any employee have any grievance arising from the operation or interpretation of this Agreement which pertains to wages, rates of pay, hours of work or other conditions of employment, an earnest effort shall be made to adjust such grievance immediately in the following manner:

Step No. 1: Between the Room Steward accompanied by the aggrieved employee, in the employee's discretion, and the department Overseer, or Second Hand in the absence of the Overseer.

Step No. 2: Between the General Shop Committee and the Mill Superintendent accompanied by the aggrieved employee, in his discretion; provided that the General Shop Committee shall have submitted to the Employer a written statement of the grievance, containing all information available in order that the Company be aware of the basis therefor, at least forty-eight (48) hours prior to the grievance meeting. If such grievances are not submitted at this step within thirty (30) working days after the occurrence or inception of the grievance, unless cause of the

grievance is still current, they will not be considered void, [fol. 22] except as set out in Article III—"Discipline and Discharge."

The Mill Superintendent shall reduce his answer to writing and deliver it to the Committee within ten (10) working days.

Step No. 3: Between a representative of the Union and a representative of the Employer's executive management, accompanied by the General Shop Committee in its discretion.

The adjustment of any grievance under the above procedures (Steps 2 and 3) shall be reduced to writing and signed by representatives of the Employer and the Union.

Step No. 4: If the grievance shall not have been adjusted by the above procedure within fifteen (15) days after its presentation under Step No. 3 (unless an extension of time is agreed upon), the party presenting the grievance shall be governed by the provisions of Article IX (F) hereof.

(B) No casual correction, routine change, supervision or direction of the working force shall be considered a grievance unless the application of such matter creates a grievance.

(C) Grievance Meeting: The Mill Superintendent shall meet the General Shop Committee at least twice each month on scheduled days which may be changed by mutual consent but which are hereby tentatively set for the second and fourth Thursday of each month at 2:00 p.m., and at such other times as may be necessary [fol. 23] to adjust grievances at a time convenient to both parties. The Employer's Representative of executive management shall meet with the Union's Representative and the General Shop Committee at least once each month, on regularly scheduled days which may be changed by mutual consent but which are hereby tentatively set for the second Tuesday of each month at 2:00 p.m.

(D) Conciliation: Either party to this Agreement may, prior to a demand for arbitration as herein provided and provided the other party has not less than five (5) days' written notice thereof request the Federal Mediation and Conciliation Service to send a Commissioner of Conciliation Service and/or Technicians to assist in a settlement

of the issues. In the event such a request is made, the right of arbitration shall be postponed until the conciliation has become effective or until either party hereto may elect to refer the matter to arbitration and so indicates in writing to the other party.

## Article IX

### Strikes and Lockouts—Arbitration

(A) The Employer and the Union agree that the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances, subject to the grievance procedures provided herein, arising under the terms of this contract.

It is the desire of the Union and the Employer to avoid strikes and work stoppages.

(B) If, as a result of the failure of an employee to exhaust all grievance procedures available under the con- [fol. 24] tract, a work stoppage, intentional slow-down of production, or strike occur, such employees who participate may be disciplined or discharged. However, disciplinary action shall be taken promptly against such employee, in no event subsequent to thirty (30) days from the time the action complained of occurred. The term "intentional slow-down of production" shall mean a condition of willful restriction or reduction of production by any employee which is within such employee's reasonable control.

(C) During any period in which any employees are engaged in any work stoppage, strike, or intentional slow-down of production before all available settlement procedures provided in the contract have been exhausted, the Employer will not be required to bargain with representatives of the Union with respect to any employees engaged in such work stoppage, strike or intentional slow-down.

(D) (1) In any case where a work stoppage or strike occurs because of a grievance which is arbitrable under the contract, or occurs without all available grievance procedures having been exhausted the Union shall promptly, upon notification by letter or telegram from the Employer, to the Union's Southern Director, Charlotte, N. C. with a copy to the Union's General Office at New York, New York,

issue a written statement directed to its members, with a copy to the Employer to use as it desires, as follows:

You are advised that a (stoppage of work) (strike) (intentional slow-down of production) occurred ..... in the ..... Department at the Lincoln Mills of Alabama. This action was unauthorized by the Textile Workers Union of America.

[fol. 25] "You are directed to promptly return to your respective jobs and to cease any action which may adversely affect production you are directed to discontinue and disregard any picket line which may exist in the plant.

"The grievance (S) in dispute will be processed through the regular grievance procedures provided for in your contract."

It is agreed that an authorized officer of the Local Union and/or an authorized officer of the International Union shall sign the notice above referred to.

(2) Upon notification given the Union by the Employer the action referred to in the preceding paragraph has not brought about a termenation of such work stoppage, strike, or intentional slow-down of production the Union will take such further steps as it, in its discretion, considers reasonable and appropriate under the circumstances to bring about compliance with the notice referred to in paragraph (1) above.

(E) The Employer agrees that in consideration of the performance by the Union of the undertakings herein assumed by it in Paragraph (D) hereof with respect to the termination of unauthorized strikes and work stoppages, there shall be no liability by suit for damages on the part of the Union, its officers, agents or members, for breach of contract of any kind or character whatsoever.

(F) Any disagreement or dispute between the Union and the Employer, arising from the operation or interpretation of this Agreement which pertains to wages, rates of pay, hours of work or other conditions of employment, which has not been satisfactorily adjusted within the [fol. 26] fifteen (15) days referred to in Step No. 4, Article VIII, or within the ten (10) days referred to in Article III, whichever applies to the disagreement or dispute and is

otherwise timely as provided in this Agreement, may be submitted to arbitration by either party giving written notice within ten days after the expiration of the applicable time limit referred to above. Failure to give such written notice will constitute an abandonment of the disagreement or dispute.

Within ten (10) working days after receipt of written notice of demand for arbitration sent by either party to the other, the parties shall confer and endeavor to agree upon the selection of an arbitrator. Should they be unable to agree, within three days of the date of the meeting, then the parties, or either of them, may request the American Arbitration Association to submit to them jointly a list of five qualified arbitrators, from which the parties shall select an impartial arbitrator by alternately striking one name each from the list until one name remains. If the issues in dispute involve the determination of work loads or work assignments and/or the setting of piece rates in connection therewith, the American Arbitration Association shall be requested to include on its list qualified textile technicians or persons who by prior experience and training are qualified to arbitrate and decide the issue in dispute. The list submitted shall specify the experience and training of the persons named on the list, and any person without experience and training shall not be considered as having been nominated, and a new name or names may be requested in lieu thereof.

Except as provided above, the rules, regulations, and procedures of the American Arbitration Association shall be applicable.

[fols. 27-48] The expenses of the impartial arbitrator shall be shared equally by the parties.

It is understood and agreed that the arbitrator shall have no right to make changes in the terms and provisions of this Agreement.

Exceptions: Notwithstanding anything in this Agreement to the contrary, it is agreed that disputes with respect to general wage revisions shall not be subject to arbitration.

[fol. 49]

## Article XVI

### Termination

This Agreement shall continue in full force and effect until midnight July 3, 1954, and for one year terms there-
[fols. 50-51] after unless written notice of termination shall be mailed by either party to the other at least sixty (60) days prior to the end of the then current term, in which event this Agreement shall terminate at the end of the then current term. Such notice shall be sent by Registered Mail to the Employer at Huntsville, Alabama, or the Textile Workers Union of America, CIO, 731 Frank Nelson Building, Birmingham, Alabama, as the case may be, and if served by the Employer, copy of said notice shall also be sent by Registered Mail to the President of the Textile Workers Union of America, Local Union No. 230, at Huntsville, Alabama.

In Witness Whereof, the parties hereto, by their duly authorized representatives, have set their hands and seals as of the day and year first above written.

Lincoln Mills of Alabama, By J. W. O'Neal, General Superintendent.

Textile Workers Union of America, CIO, By C. D. Boartfield.

Attest: W. M. Painter.

Ratified and approved by Local No. 230, T. W. U. A.: L. B. Johnson, J. C. Wilbourn, F. J. Petty.

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[fol. 52]

## Exhibit "C" to Exhibit "A"

### Statement—Downtime Practice

The following is a brief statement as to the practice prevailing during 1947-1948 in handling downtime for piece rate employees.

1. All downtime allowances were approved by the Superintendent with the assistance of the General Superintendent where questionable.

2. Each instance involving downtime was handled separately and on the merits of the particular case, taking into consideration what part of job affected, and adjustments were made on daily or weekly basis depending on job affected.

3. All major items were approved, but no consideration was given to minor items.

4. Where agreement or procedure, such as 30 minutes on slubbers and frames had been made, same prevailed. The old procedure in Weave Room where looms had to stand 24 hours before any allowance was made was discontinued and instead each instance was handled on its merit considering all circumstances.

5. In making allowances, the basis of the allowance was the production factor for the job involved; as an example—90% on Mod. D. Looms.

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[fol. 53] EXHIBIT "B"

Complaint

June 23, 1954.

Cloth Rollers—All Shifts

According to notice date April 6, 1954, Cloth Rollers assignment would be 134 looms where doffing cloth from looms and according to notice date June 5, 1954, Cloth haulers will have their present duties amended to the extent of being required to take off cloth on their assigned looms (same duties as these assigned to cloth haulers presently taking off cloth) and as necessary additional cloth haulers would be assigned in accordance with the running schedule of the plant. The Union contends that the last notice is not being abided by. The Union is requesting that the first notice of the assignment of the jobs to equal said notices.

Chas. Lefty, F. J. Petty, J. D. Brooks.

July 22, 1954.

We do not know of any failure on our part to abide by the job change notice as stated in the complaint. If the

Union will point out what violations was made we will be glad to make every effort to correct same.

August 16, 1965.

This complaint is considered closed, it being understood that the present job of cloth haulers is *de*t up on the basis of 139 looms per job.

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[fol. 54] EXHIBIT C

Textile Workers Union of America
Affiliate of the C. I. O.:

Grievance Report

Date.—June 23, 1954.

Local No. 230

Name of Member—Card Grinders Helpers All Shifts
Mill.—Lincoln Mills of Alabama

Dept.—Carding

Nature of Grievance. On Monday, May 24, 1954 the Company changed the Card grinders Helpers duties. The added duties have been increased to the extent that they can not get their proper fatigue and personal time. The Union is asking that the new duties be reduced back to the prior work assignment before the jobs were increased and that they be paid for all added duties they have performed.

Committee Signature, (S.) Chas. Lefty, F. J. Petty, J. D. Brooks.

Union Copy

(Reverse side of Grievance Report Form)

Step No. 3

July 23, 1954.

Answer: The Card Grinder Helper jobs were changed to provide for blowing down overhead each shift in the

[fol. 55] Card room. This new duty was an addition to their present duties but was not such a burden that it denied the Grinder Helpers of their fatigue and personal time. Our observation of the job since the change has not shown us a basis for the contention that the job is unreasonable.

Signed R. F. Day, Superintendent.

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EXHIBIT "D"

Textile Workers Union of America
Affiliate of the C. I. O.

Grievance Report.

Date.—June 23, 1954.

Local No. 230.

Name of Member.—Slubber Hands #234 Card Room All Shifts.

Mill Lincoln

Dept.—Carding.

Nature of Grievance.—On May 24, 1954 the Company added to the Slubber Tenders also J-3 hands the added work or duties of turning cans, piecing creels cans to their assignment. The Union is therefore asking that the Slubber hands and J-3 hands jobs be restored back to their normal duties prior to May 24, 1954, with pay for the extra duties they have performed. Prior to this date the Slubber hands jobs were increased due to increased speed of the machines [fol. 56] of twenty-five turns per minute.

Committee Signature, (S.) Chas F. Lefty, F. J. Petty, J. D. Brooks.

Union Copy—

(Reverse side of Grievance Report Form)

Step No. 3

July 22, 1954.

Answer: We find no basis for the request as stated in the complaint since the performance of the job has indicated it is operating satisfactorily and the work assignment is not out of line with other mills on our type goods.

We are not aware of any speed change on slubbers as indicated in the complaint. The speed is dept on standard by periodic adjustments, but no increase has been made in speed.

Signed R. F. Day, Superintendent.

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[fol. 57] EXHIBIT "E"

Textile Workers Union of America
Affiliate of the C. I. O.

Grievance Report.

Date—June 23, 1954.

Local No. 230.

Name of Member—Sweepers all shifts.
Mill Lincoln

Dept.—No. 2 and No. 4 Carding.

Nature of Grievance.—On May 24, 1954 the Company added new duties to the sweepers of making Roving on Slubbers and "J" 3s. Prior to May 24, 1954 the Company had increased the duties of these people to the extent that it was already a full workload, the Union is therefore requesting that the Company restore these employees to their former jobs as they were on prior to May 24, 1954, with pay for the extra work they have been doing since May 24, 1954.

Committee Signature, (S:) Chas. F. Lefty, F. J. Petty, J. D. Brooks.

Union Copy—

(Reverse side of Grievance Report Form.)

Step No. 3

July 15, 1954.

Answer: The performance of the job during the trial period has indicated that the duties of the Sweepers are [fol. 58] fair and reasonable. We changed duties of the Sweepers in order to allow for more use of the productive time of Sweepers so that our card room operation would be more normal and practical. This action was necessary if we are to get our operations in line with present modern-day operations of competing mills.

Signed R. F. Day, Superintendent.

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EXHIBIT "F"

Textile Workers Union of America
Grievance Report

June 23, 1954.

Local No. 230.

Name of Member—Transfer Man All Shifts Carding.
Mill Lincoln
Dept.—Carding

Nature of Grievance.—On May 24, 1954 the Company added to the Slubber Tenders also J-3 hands the added work or duties of turning cans, piecing creels cans to their assignment. The Union is therefore asking that the Slubber hands and J-3 hands jobs be restored back to their normal duties prior to May 24, 1954, with pay for the extra duties they have performed. Prior to this date the Slubber hands jobs were increased due to increased speed of the machines of twenty-five turns per minute.

Committee Signature, (S.) Chas. F. Lefty, J. D. Brooks.

Union Copy—

[fol. 59] (Reverse side of Grievance Report Form)

Step No. 3

July 15, 1954.

Answer: We can find no basis for the request of the Union as stated in this complaint other than that new duties were added to the duties of the Transfer men.

We find that the job has a reasonable amount of duties, as has been proven by the performance of the job during the trial period, and since the trial period. We therefore can not restore the job back to its former status as there is no basis for doing that.

Signed R. F. Day, Superintendent.

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EXHIBIT "G"

Textile Workers Union of America
Affiliate of the C. I. O.

Grievance Report

Date.—June 23, 1954.

Local No. 230.

Name of Member.—Can Dumper & Roving Marker.
Mill Lincoln Mills

Dept.—Carding All Shifts.

Nature of Grievance.—On May 24, 1954 the Company discontinued the job of can dumping (Roving Marker). [fol. 60] The Union is therefore asking that the Company reinstitute this job.

Committee Signature, (S.) Chas. F. Lefty, F. J. Petty, J. D. Brooks.

Union Copy—

(Reverse side of Grievance Report Form)

Step No. 3

July 15, 1954.

Answer: The complaint is asking that we reinstitute the Roving Marker job because we discontinued it. We can see no basis in changing the job for that reason. However,

upon checking the job we feel that the duties as now laid out are in line and can see no reason for granting the request of the complaint.

Signed R. F. Day, Superintendent.

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[fol. 61] EXHIBIT H

Textile Workers Union of America
Affiliate of the C. I. O.

Grievance Report

Date.—June 23, 1954.

Local No. 230.

Name of Member.—Frame Fixers all Shifts.
Mill Lincoln Mills.

Dept.—All Shifts Carding.

Nature of Grievances.—On May 24, 1954 the Company added the extra duty of blowing down over-head each shift from Drawing Frames to the Spinning Frames, therefore the Union is asking that these employees be relieved of this extra duty immediately.

Committee Signature, (S.) Chas. F. Lefty, F. J. Petty, J. D. Brooks.

Union Copy—

(Reverse side of Grievance Report Form)

Step No. 3

July 22, 1954.

Answer: There is no reason given in the complaint for granting the request made in the complaint except that [fol. 62] since an extra duty was added it should immediately be taken off.

The Frame Fixers have an assignment that is well within the bounds of being fair and reasonable. We can find no basis for changing the jobs as requested.

Signed R. F. Day, Superintendent.

EXHIBIT "I"

Textile Workers Union of America
Affiliate of the C. I. O.

Grievance Report

Date.—June 24, 1954.

Local No. 230.

Name of Member.—False & Jenks Twister tenders and Doffers.

Mill Lincoln.

Dept.—Twisting.

Nature of Grievance.—The assignments of the above jobs were changed on May 19, 1954, from five frames to 7½ frames. This job being completely out of line for a reasonable work assignment due to the increased number of frames to tend. The Twister tending can not run the job even without any fatigue time being taken. There-
[fol. 63] fore the Union is asking that the assignment of these jobs be restored as they were prior to May 19, 1954.

Committee Signature, (S.) Chas. F. Lefty, J. D. Brooks.

Union Copy—

(Reverse side of Grievance Report Form)

Step No. 3

July 22, 1954.

Answer: The performance of the job during the trial period has indicated the job is fair and reasonable. The job assignment was changed in order to provide for more use of the productive time of employees involved.

We can find no basis for the job being out of line as stated in the complaint and therefore can not restore the job to its status before the change.

Signed R. F. Day, Superintendent.

[fol. 64] EXHIBIT "J"

Textile Workers Union of America
Affiliate of the C. I. O.

Grievance Report

Date.—June 24, 1945.

Local No. 230.

Name of Member.—Warp Twister Creeler Hands all shifts.

Mill Lincoln.

Nature of Grievance.—On May 19, 1954. The Twister creeler Hands were reduced from four (4) to three (3) and the three remaining were to perform the work formerly done by the four, the three hands left on the assignment are not able to perform the work properly in the allotted time. The Union is, therefore, requesting that the work assignment for the Twister Creeler Hands be restored to what it was prior to May 19, 1954.

Committee Signature, (S.) Chas. F. Lefty, F. J. Petty, J. D. Brooks.

(Reverse side of Grievance Report Form)

Step No. 3

July 14, 1954.

Answer: The warp twister creeler jobs have been performed properly within the allotted time as evidenced by [fol. 65] the performances of the job during the trial period. We can see no basis for changing job assignment as requested since the job is not unreasonable.

We have made this job change in order to have an efficient and practical mill operation so that we may be in a position to compete with other mills in our same business.

Signed R. F. Day, Superintendent.

EXHIBIT K

Textile Workers Union of America
Grievance Report

June 24, 1954.

Local No. 230.

Name of Member.—Warp Twister Doffers.
Mill Lincoln.
Dept.,—Twisting.

Nature of Grievance.—On May 19, 1954, the Twister tender doffers on the Whiting H. & Bs Lowells and Saco-Lowells were given another twister from. The Twister tender hands can not run this many frames and do the required duties that is required of this job and get their proper fatigue and personal allowance time. If heavier yarns are put on those frames it would be impossible to do their duties much less get their fatigue and per-
[fols. 66-67] sonal time; therefore the Union is requesting that the jobs be restored back to their original assignments.

Committee Signature, (S.) Chas. F. Lefty, F. J. Petty, J. D. Brooks.

Union Copy—

(Reverse side of Grievance Report Form.)

Step No. 3

July 22, 1954.

Answer: The performance of the job during the trial period has indicated that the jobs involved are fair and reasonable. If heavier yarns are put on the frames to the extent that the job is materially affected, the Company will review the jobs in question and if some adjustment is necessary, the proper adjustment will be made. It was necessary to change these jobs to their present assignment in order to place that operation on a practical and economic basis.

Signed R. F. Day, Superintendent.

[fols. 68-69] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT—Filed February 8, 1955

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

Frank A. Constangy and Bell, Morring & Richardson, By Patrick W. Richardson, Attorney for Defendant.

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[fol. 70] IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 8, 1955

For Answer to the Complaint herein, the Defendant shows:

1

Defendant admits the allegations of Paragraph 1 insofar as they allege that the plaintiff Labor Union is an unincorporated association and insofar as they allege that the Defendant is a corporation doing business in and having a place of business at Huntsville, Madison County, Alabama, within this District, and insofar as they allege that the Defendant purchases raw materials from and ships finished products to points outside the State of Alabama.

2

Defendant denies that allegations of Paragraph II of the Complaint except as hereinafter admitted.

Defendant admits that on or about June 27, 1953 it executed a written collective bargaining Agreement with the Plaintiff. Further answering the allegations of said Paragraph, Defendant shows that said contract by virtue of a notice in accordance with Article XVI thereof, expired by its own terms on July 3, 1954; and that said contract has not been extended or renewed and that there has been no Contract or other Agreement in effect between the Plaintiff and Defendant since that time.

[fol. 71] Defendant further shows that the Contract attached as Exhibit A to the Complaint is incomplete and does not reflect the entire agreement between the Plaintiff and the Defendant which was executed on June 27, 1953 and expired on July 3, 1954. Defendant attaches hereto, as Exhibit A to this Answer, a copy of the complete Agreement which was in effect during the periods above mentioned.

3

Defendant denies that allegations of Paragraph II of the Complaint except as hereinafter admitted.

Defendant shows that the grievances attached to the Complaint, as Exhibits B through K, were filed with it in writing on June 25, 1954; that no further action occurred on said grievances between the date of the expiration of the Contract under which they were filed. Defendant shows that no demand for arbitration was made on these grievances during the life of said Agreement. Defendant further shows that as of the time the demand for arbitration of the alleged grievances was made there was no written or oral agreement or contract between the Plaintiff and the Defendant wherein the Defendant agreed to or committed itself to arbitrate these or any other grievances or complaints filed by the Plaintiff.

Defendant further shows that its refusal to arbitrate the alleged grievances did not occur until the demand for arbitration was made and that such demand for arbitration was made after the expiration of the Agreement upon which the demand was purportedly based.

[fol. 72]

4

Defendant denies the allegations of paragraph IV of the Complaint.

5

Answering Paragraph V of the Complaint, Defendant denies each and every allegation of said Paragraph and shows it has not failed or refused to perform its obligations under Article IX (f) of any other Section of the Agreement of June 27, 1953 at any time when said Agreement was in effect; that the alleged breach complained of

in the said Complaint is an allegation of a breach of an Agreement which, according to the Complaint, occurred after the Agreement itself had expired and was not in effect.

Wherefore, Defendant prays that the said Complaint be dismissed.

Respectfully submitted, Frank A. Constangy, and Bell, Morring & Richardson, By Patrick W. Richardson, Attorneys for Defendant, Lincoln Mills of Alabama, 610-14 State National Bank Building, Huntsville, Alabama.

We hereby certify that we have served the foregoing Answer on Cooper, Mitch & Black, attorneys of record for the plaintiff, Textile Workers Union of America, CIO, [fol. 73] by depositing a copy thereof in the United States Mails, postage prepaid, addressed to said attorneys at "1329 Brown-Marx Building, Birmingham, Alabama," this 7th day of February, 1955.

Frank A. Constangy, and Bell, Morring & Richardson, By Patrick W. Richardson, Attorneys for Defendant, 610-14 State National Bank Building, Huntsville, Alabama.

NOTE RE EXHIBIT "A"

This Exhibit is heretofore set out as Exhibit "A" to the Complaint on Page 5 of this Record.

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[fol. 74] IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACT—Filed June 30, 1955

Come now Lincoln Mills of Alabama, appellant, and Textile Workers Union of America, CIO, appellee, by their respective counsel of record, and stipulate and agree hereby that the evidence introduced by the respective parties upon the hearing of this cause at Huntsville, Alabama on March 3, 1955 consisted, in substance, of the following:

1. A stipulation of the facts by counsel for the respective parties, which stipulation, in substance, is fully and

correctly set forth in paragraphs numbered 1 through 6, inclusive, under the heading "Findings of Fact" of the judgment of the Court rendered herein on the 29th day of April, 1955; and

2. A printed pamphlet containing a collective bargaining agreement entered into the 27th day of June, 1953 by and between the parties; and

3. Ten grievances, seven of which were filed by the appellee with the appellant on June 23, 1954 and three of which were filed by the appellee with the appellant on June 24, 1954.

The said collective bargaining agreement and grievances being exhibited with the appellee's original complaint in this cause and identified as Exhibits A through K, inclusive, to said complaint and being the same collective bargaining agreement and the same grievances referred [fols. 75-76] to in paragraphs numbered 2 and 3 of the aforesaid "Findings of Fact" set forth in the judgment of the Court entered the 29th day of April, 1955, the said pamphlet copy of said collective bargaining agreement and the said ten grievances, including the indorsement of the appellant's respective actions thereon upon the reverse thereof, being introduced and accepted in evidence in their entirety, respectively.

4. That the foregoing constitutes all of the evidence introduced by the parties at the aforesaid hearing in this cause held on the 3rd day of March, 1955.

Frank A. Constangy, and Bell, Morring & Richardson, By Patrick W. Richardson, Attorneys for Lincoln Mills of Alabama, Appellant. 610-14 State National Bank Building, Huntsville, Alabama.

Benjamin Wyle, and Cooper, Mitch & Black, By Jerome A. Cooper, Attorneys for Textile Workers Union of America, CIO, Appellee, 1329 Brown-Marx Building, Birmingham, Alabama.

[fol. 77] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT—
Filed April 29, 1955

[Title omitted]

This cause, coming on to be heard before the Court without the intention of a jury, was submitted to the Court, with disposition of defendant's motion to dismiss reserved, on the 3rd day of March, 1955, upon evidence introduced by plaintiff and defendant and their stipulations. After oral arguments, and submission of briefs of both parties, this cause was taken under advisement by the Court. On this 29 day of April, 1955, the Court, after a full and careful consideration of the evidence and of the oral arguments and briefs, makes and enters the following findings of fact, conclusions of law, and judgment:

Findings of Fact

1. The Textile Workers Union of America, CIO, an unincorporated association (hereinafter referred to as "plaintiff") plaintiff herein, is and was during the time here involved an unincorporated association and labor organization as defined by the provisions of the Labor Management Relations Act of 1947. The Lincoln Mills of Alabama (hereinafter referred to as "defendant") is and was during the time here involved a corporation [fol. 78] owning and operating a textile mill in Huntsville, Alabama. During the time here involved, the defendant in the operation of its mill has engaged, and now engages, in an industry affecting commerce as defined by the provisions of the Labor Relations Act of 1947, and defendant and its employees were and are subject to the provisions of the said Act.

2. On or about June 27, 1953, the defendant executed a written collective bargaining agreement with the plaintiff. This collective bargaining agreement provided, in Article VIII thereof for the adjustment of "any grievance arising from the operation or interpretation of this agreement which pertains to wages, rates of pay, hours of work or

other conditions of employment" by utilization of the contract's grievance procedure, culminating, as its final step, in arbitration. Article IX (F) of that agreement provided that "the parties shall confer and endeavor to agree upon the selection of an arbitrator. Should they be unable to agree within three days of the date of the meeting, then the parties or either of them, may request the American Arbitration Association to submit to them jointly a list of five qualified arbitrators from which the parties shall select an impartial arbitrator by alternately striking one name each from the list until one name remains."

3. On June 23, 1954, seven grievances were duly signed by individual employees and filed with the defendant, as employer, by the plaintiff. On June 24, 1954, three additional such grievances were duly signed and filed with the defendant.

4. The above collective bargaining agreement expired July 3, 1954.

[fol. 79] 5. The above grievances were not granted and were denied by defendant in the Third Step of the grievance procedure. One was denied on July 14, 1954; three, on July 15, 1954; and six, on July 22, 1954.

6. Although duly requested to do so, defendant refused to submit these unresolved grievances to arbitration as provided in paragraph IX (F) of the Agreement.

## Conclusions of Law

1. The Court has jurisdiction of the parties and of the cause of action by virtue of the provisions of Section 301 of the Labor Management Relations Act of 1947.

See, Association of Employees v. Westinghouse Corp., 210 F. (2d) 623, at 628, affirmed March 28, 1955, U. S. Rock Drilling, Blasting, etc. v. Mason Hanger Co. Inc., 217 F. (2d) 687, cert. den. U. S. (April 25, 1955).

2. Plaintiff has a right to bring and maintain this action to compel arbitration by virtue of the provisions of Section 301.

Evening Star v. Columbia Typographical Union, 124 F. Supp. 322, Wilson Bros. v. Textile Workers Union, USDC SD New York, F. Supp., December 15, 1954. TWUA

v. American Thread Co., D. C. Mass., 113 F. Supp. 137.

Plaintiff's remedy, and the substantive rights that plaintiff relies upon, are created by this Federal Act.

Shirley-Herman Co. v. Int'l Hod Carriers, 182 F. (2d) 806.

[fol. 80] 3. Since the grievances in question arose from the operation or interpretation of the collective bargaining agreement and while it was in effect, the expiration of that agreement thereafter does not relieve defendant of its contractual obligation to arbitrate. Actually, defendant seems to have considered the grievances in question, in the Third Step of the grievance procedure, after that expiration date had occurred. In any event, defendant is obligated under the collective bargaining contract in question to arbitrate grievances which duly arose and were instituted prior to the contract's termination date. Claim respecting matters that arise during a contract's term obviously often cannot be disposed of within that period of time.

Lane v. Endicott Johnson, 299 N. Y. 725, 87 NE 2d 450.

In re Commercial Telegrapher's Union, 123 N. Y. S. 2d 259.

Columbia Casualty v. Drivers and Chaffeurs Union, 107 N. Y. S. 2d 90.

Cf. e. g. Nulisundis Shipping Co. v. Amtog Trading Corp., 125 F. (2d) 978 (CCA 2) RFC v. Hanison's & Crossfield, 204 F. (2d) 366 (CCA 2) cert. den. 346 U. S. 854.

Wilson Bros. vs. Textile Workers Union, supra.

4. Plaintiff is entitled to have the grievance in question, which are Exhibits B through K to the complaint, promptly submitted to arbitration for final determination in accordance with and as provided by Article IX (F) of the above collective bargaining agreement, which is Exhibit A to the complaint.

5. Plaintiff has not proven and is not entitled to recover damages against defendant.

[fol. 81] 6. Plaintiff is entitled to an order requiring defendant to submit the grievances referred to herein and as set out in the complaint to arbitration for binding de-

termination in accordance with Article IX (F) of the above Agreement.

IN UNITED STATES DISTRICT COURT

JUDGMENT—April 29, 1955

Upon the basis of the foregoing it is hereby Ordered, Adjudged and Decreed by the Court:

1. That the defendant promptly perform and comply with Article IX(F) of said contract with respect to said unresolved grievances which are Exhibits B through K to the complaint;

2. That defendant be and same hereby is restrained from in any manner failing or refusing to perform or comply with its contractual obligations under said Article IX (F) with respect to said grievances;

3. That the defendant promptly submit said unresolved grievances to arbitration and take the necessary steps to that end, as provided in said Article IX (F).

It is further Ordered, Adjudged and Decreed that defendant's motion to dismiss be, and the same hereby is, denied; that plaintiff is not entitled to incidental monetary damages, and that the costs of this suit be and they are hereby taxed against the defendant, for which let execution issue.

This 29 day of April, 1955.

H. H. Grooms, United States District Judge.

[fol. 82] MOTION TO AMEND JUDGMENT—Filed May 9, 1955

The defendant moves the Court to amend its judgment or decree entered in this cause on April 29, 1955 by vacating and setting same aside and entering, in lieu thereof, a judgment for the defendant or, if the defendant be not entitled to such relief, then defendant moves the Court, in the alternative, to set aside and vacate said judgment or decree and grant unto the defendant a new trial or re-hearing in this cause and, as grounds for said motion, the defendant assigns the following:

1. Said judgment is contrary to the facts in the case.

2. Said judgment is contrary to the evidence in the case.

3. Said judgment is contrary to the great weight of the evidence in the case.

4. Said judgment is contrary to the law in the case.

5. That, under the undisputed facts and evidence in the case, the defendant is now and was at the time the plaintiff demanded the arbitration in issue and at the time the defendant denied the plaintiff's grievances upon which such arbitration was demanded and is sought in this case under no contractual or other obligation to the plaintiff or to any member of the plaintiff union with respect to the matters complained of in said grievances.

6. That the undisputed evidence shows that the plaintiff's grievances upon which compulsory arbitration is sought in this cause all relate to work loads and duty [fol. 83] assignments of certain of the defendant's employees who are members of the plaintiff union; that the defendant's contractual agreement with the plaintiff was terminated prior to the plaintiff's right to and demand for arbitration on said grievances and that, therefore, the plaintiff, no longer had at the time of its demand for arbitration, nor does it now have, any right to require of the defendant anything with respect to the subject matter of said grievances.

7. That the plaintiff, since the termination of its agreement with the defendant, no longer has any right to require of the defendant the action demanded by its grievances upon which compulsory arbitration is sought in this cause, wherefore, the question sought to be arbitrated is now moot, all of which appears from the evidence, without contradiction.

8. That the plaintiff's agreement with the defendant was terminated on July 3, 1954, as appears from the evidence, and that the plaintiff has not, since said date, been entitled to any of the relief sought by its grievances, by arbitration or otherwise, it appearing from the evidence that said grievances relate solely to work assignments, which the defendant has been free to make or change as it sees fit since the said termination of said agreement with the plaintiff.

9. That it appears without dispute in the evidence that, since July 3, 1954, the arbitration sought by the plaintiff would be fruitless, futile and a nullity for the reason that the defendant has been free, since said date, to act as it choses with respects to the matters sought to be arbitrated and would, therefore, be under no obligation now [fol. 84] to respect or conform to any award of the arbitration which the plaintiff seeks.

Frank A. Constangy, and Bell, Morring & Richardson, By Patrick W. Richardson, Attorneys for Defendant, 610-14 State National Bank Building, Huntsville, Alabama.

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[fol. 85] AMENDMENT TO MOTION TO AMEND JUDGMENT—Filed May 10, 1955

The defendant moves the Court to amend the motion heretofore filed in this cause on the 6th day of May, 1955, moving the Court to amend its judgment or decree entered in this cause on April 29, 1955 by vacating and setting same aside and entering in lieu thereof a judgment for the defendant or if the defendant is not entitled to such relief then defendant moves the Court in the alternative to set aside and vacate said judgment or decree and grant unto the defendant a new trial or rehearing in this cause; and as additional grounds for said motion the defendant assigns the following:

[fols. 86-87] 10. That the Court is without jurisdiction to grant the relief decreed in this cause.

11. That said judgment is contrary to the law in that the decree sought to confer substantive rights in Conclusion of law Number 2, second paragraph, in said decree under Section 301 of the National Labor Relations Act, which said Section is procedural only and confers no substantive rights.

Frank A. Constangy, and Bell, Morring & Richardson, By Robert K. Bell, Attorneys for Defendant,

610-14 State National Bank Building, Huntsville, Alabama.

5-20-55.

Amendment to Motion granted.

H. H. Grooms, Judge.

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[fol. 88] In United States District Court

Order Overruling Defendant's Motion to Amend Judgment, etc.—Filed May 23, 1955

This cause, coming on to be heard on the 20th day of May, 1955, was submitted to the Court on the amended motion of the defendant to amend the judgment or decree entered in this cause on April 29, 1955, by vacating and setting aside the same and entering in lieu thereof a judgment for the defendant, or in the alternative to vacate said judgment and grant the defendant a new trial or a hearing in this cause. After consideration of the defendant's said motion, as amended, oral argument of counsel for the respective parties, and additional authorities submitted to the Court, the Court is of the opinion said motion, as amended, should be denied:

It is, therefore, for good cause shown, Ordered, Adjudged and Decreed by the Court that the defendant's said motion, as amended, be and the same is hereby overruled and denied.

Done and ordered, this the 23rd day of May, 1955.

H. H. Grooms, Judge.

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[fol. 89] In United States District Court

Notice of Appeal—Filed May 26, 1955

[Title omitted]

Notice is hereby given that Lincoln Mills of Alabama, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the

Fifth Circuit from the final judgment entered in this action on the 29th day of April, 1955.

(S.) Frank A. Constangy, and Bell, Morring & Richardson, By Patrick W. Richardson, Attorneys for Appellant, Lincoln Mills of Alabama, a Corporation.

[fol. 90] IN UNITED STATES DISTRICT COURT

MOTION FOR SUPERSEDEAS—Filed May 26, 1955

Comes now Lincoln Mills of Alabama, a corporation, defendant in the above action, and moves the Court to order a suspension of the injunction awarded to the plaintiff by the Court's judgment entered in said action the 29th day of April, 1955, pending said defendant's appeal from said judgment heretofore taken to the United States Court of Appeals for the Fifth Circuit, upon the said defendant entering into bond, with sufficient sureties and conditions according to law and in such sum and upon such other conditions as the Court shall consider proper for the security of the rights of the plaintiff; and, as grounds for said motion, the defendant says:

1. That the defendant will suffer irreparable injury in the loss of time of its officers, agents and employees and expenses to be incurred by the defendant in a submission to arbitration as ordered by the Court's said judgment, in the event that the said judgment is reversed upon the defendant's said appeal therefrom.

2. That the defendant will suffer irreparable injuries in complying with the injunction decreed by the Court's final judgment, in the event said judgment is reversed on the defendant's said appeal therefrom.

3. That the defendant will suffer irreparable injuries in complying with the award of the arbitration to which it is ordered to submit by the Court's said judgment, if the [fol. 91] award is adverse to the defendant's position heretofore taken upon the issues ordered to be submitted,

in the event that the Court's said final judgment is reversed on the defendant's said appeal therefrom.

Frank A. Constangy, and Bell, Morring & Richardson, By Patrick W. Richardson, Attorneys for Defendant.

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[fol. 92] In United States District Court

Order Granting Supersedeas, etc.—Filed June 13, 1955

This cause, coming on to be heard, was submitted on the motion of the defendant for an order suspending the permanent injunction heretofore granted by this Court in its final judgment entered in this cause on April 29, 1955, during the pendency of an appeal taken from said judgment; and it appearing to the Court that the defendant's said motion is well taken:

It is, therefore Ordered, Adjudged and Decreed by the Court that the defendant's said motion is granted and a suspension and supersedeas of said injunction granted in the judgment of April 29, 1955, are hereby allowed, conditioned upon the defendant giving a bond in the sum of $1,000, with sufficient sureties, and further conditioned that said bond be made payable to the plaintiff, or its successor, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been harmed by the granting of this motion [fol. 93] for supersedeas, if this cause is affirmed on appeal; otherwise said bond to be null and void.

Done and ordered, this the 9 day of June, 1955.

H. H. Grooms, Judge.

In United States District Court

Supersedeas Bond—Filed June 20, 1955

We the undersigned jointly and severally acknowledge that we and our personal representatives are jointly bound

to pay to Textile Workers Union of America, CIO, plaintiff, the sum of $1,000.00.

The condition of this bond is that whereas the defendant has appealed to the Court of Appeals for the Fifth Circuit from the judgment of this Court, entered April 29, 1955, if this defendant shall pay the amount of that final judgment herein if his appeal shall be dismissed or the judgment affirmed or modified together with all costs that may be awarded, then this bond is void, otherwise to be and remain in full force and effect.

Lincoln Mills of Alabama, Huntsville, Alabama, By (S.) William A. Barrell, Jr., Its Treasurer.

Attest:

(S.) J. W. O'Neal, Its Secretary.

[fols. 94-96] Above bond with $1,000.00 cash surety thereon approved this 20th day of June, 1955.

H. H. Grooms, United States District Judge.

(Seal.)

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[fol. 97] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 98] ARGUMENT AND SUBMISSION—October 5, 1955
(omitted in printing)

[fol. 99] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15697

LINCOLN MILLS OF ALABAMA, Appellant,

versus

TEXTILE WORKERS UNION OF AMERICA, CIO, Appellee

Appeal from the United States District Court for the Northern District of Alabama

OPINION—January 31, 1956

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Lincoln Mills of Alabama, the defendant below, is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and hence subject to Federal legislation relating to labor. Textile Workers Union of America, CIO, the plaintiff below, is an unincorporated association and labor organization. We will refer to the [fol. 100] parties, for brevity and clarity, as Employer and Union.

In chronological sequence, the facts from which this controversy developed were as follows:

A written collective bargaining agreement between the Union and the Employer was executed June 27, 1953, to continue until July 3, 1954, and for one-year terms thereafter unless written notice of termination should be mailed by either party to the other sixty days prior to the end of the current term, in which event the agreement would terminate at the end of the current term. Article VIII of the agreement set up procedures to be followed in the adjustment of grievances, and provided that if a grievance had not been adjusted by the Article VIII procedures within the time specified, the party presenting the grievance should be governed by the provisions of Article IX(F) of the agreement.

By Article IX of the agreement the parties agreed that

the contract grievance procedures were adequate to provide a fair and final determination of all grievances arising under the terms of the agreement. The desire of the parties to avoid strikes and work stoppages was recited. Paragraphs (A) to (E) inclusive of Article IX contained "no-strike" provisions. In Paragraph (F) of Article IX, of the agreement it was provided that any disagreement or dispute, arising from the operation or interpretation of the agreement, pertaining to wages, rates of pay, hours of work or other conditions of employment which had not been satisfactorily adjusted within the time limited, might be submitted to arbitration by the giving of writ-[fol. 101] ten notice within ten days after the expiration of the applicable time limit. It was further provided that if the parties did not agree upon an arbitrator, the American Arbitration Association should be requested to furnish the names of five qualified arbitrators and the parties should alternately strike one name each from the list until a single name remained and the person so designated should serve.

The Union filed with the Employer seven grievances on June 23, 1954, and three grievances on June 24, 1954, all of which were of the type specified in Article IX(F). The Employer followed the procedures of the agreement up to the point of rejecting the claims, the rejections being made at various dates on and subsequent to July 14, 1954. Pursuant to timely notice given pursuant to its terms, the agreement terminated on July 3, 1954. The Union requested the Employer to submit the grievances to arbitration pursuant to Article IX(F) of the agreement. The Employer refused to do so. Thereafter the Union brought this suit against the Employer asking that the Employer be required to submit the grievances to arbitration and praying for damages. The District Court declined to award damages to the Union, saying that none were proven, but decreed that the Employer submit the grievances to arbitration as provided in Article IX(F) of the agreement. Jurisdiction was found under §301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185.

Presented for our consideration are questions which

may be substantive as well as procedural. Since there is no diversity of citizenship apparent we are, at the [fol. 102] outset, required to ascertain whether there is a basis for Federal jurisdiction. The Congress has provided that:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties". Sec. 301(a) Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a).

This grant has given Federal courts jurisdiction for the consideration and determination of questions such as the one presented in this case. It has given to Federal courts the power to adjudicate, where a violation of a contract is asserted, causes of action between employers and labor organizations and to determine whether or not a cause of action exists in a particular case. It does not follow, though, from the existence of the judicial power to determine a cause of action or controversy that the right asserted has legal sanction. It does not follow from the grant of jurisdiction to hear a litigant in a Federal forum that rights have been created or remedies provided which are denied to others. That there is a right to seek relief in a Federal court does not mean that the relief sought is necessarily available. More specifically, our question is whether Section 301, taken in context, requires or permits the enforcement of an executory covenant for the submission to arbitration of grievances pursuant to a collective bargaining agreement between a union and an employer.

[fol. 103] The provisions of the contract between the parties to this appeal from which spring the problems presented are not novel, yet we do not find that the precise point presented has heretofore been considered by an appellate court. In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced. *Red Cross Line* v.

*Atlantic Fruit Co.*, 1924, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. *Tejas Development Co.* v. *McGough Bros.*, 5th Cir. 1947, 165 F. 2d 276. Such is the rule as found by the framers of the Restatement of the Law. Restatement, Contracts, §550 (1932). The Supreme Court of Alabama, announcing the rule, has said:

> "'The Courts are almost unanimous in declaring that equity will not decree specific performance of a contract to submit a cause to arbitration, while it will, in proper cases, entertain a bill to enforce an award.'' Ex parte Birmingham Fire Ins. Co. 1937, 223 Ala. 370, 172 So. 99.

If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress. The Norris-LaGuardia Act, 29 U. S. C. A. §§101, et seq., does not preclude the granting of the relief sought. *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 1949, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The United States Arbitration Act expressly provides that nothing therein "contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C.A. §1.

[fol. 104] In Section 2 it is said:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." July 30, 1947, c. 392, §1, 61 Stat. 669. 9 U.S.C.A. §2.

Section 3 of the Arbitration Act provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue refer-

able to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C.A. §3.

The Arbitration Act also provides that courts of the United States may direct arbitration in accordance with the terms of written agreements. 9 U.S.C.A. §4.

[fol. 105] The Court of Appeals of the Third Circuit has had a number of occasions to consider the application of the Arbitration Act to collective bargaining agreements, and we cannot reconcile its views as expressed in its several opinions. It first held that the stay of proceedings provisions in Section 3 of the Act applied in a class suit for unpaid over-time compensation claimed under the Fair Labor Standards Act, 29 U. S. C. A. §§201 et seq. *Donahue* v. *Susquehanna Collieries Co.*, 3rd Cir. 1943, 138 F. 2d 3, 149 A.L.R. 271. Section 1 of the Arbitration Act, containing the exclusion clause was set forth in a footnote but was not mentioned in the opinion. The Donahue case, *supra,* was followed in *Watkins* v. *Hudson Coal Co.*, 3rd Cir. 1945, 151 F. 2d 311, cert. den. 327 U. S. 777, 66 S. Ct. 522, 90 L Ed. 1005, where it was said that the exclusion clause of Section 1 was not an over-all limitation. On a second appeal of the Donahue case a stay of proceedings was directed pursuant to Section 3 until arbitration was had. *Donahue* v. *Susquehanna Collieries Co.*, 3rd Cir. 1947, 160 F. 2d 661. The same result was reached in *Evans* v. *Hudson Coal Co.*, 3rd Cir. 1948, 165 F. 2d 970. Before the next consideration of the question by the Third Circuit, Congress had reenacted the United States Arbitration Act and had included in the reenactment the following catch line of Section 1, " 'Maritime Transactions' and 'Commerce' Defined; Exceptions to Operation of Title". Act of July 30, 1947 (H. R. 2084), ch. 392, 61 Stat. 669. This, thought the court, in the next

case before it, indicated a congressional intent that the exclusion in Section 1 applied to the entire Act, and it was held that collective bargaining agreements were "contracts of employment" within the meaning of the Act. *Amalga-* [fol. 106] *mated Ass'n, etc.* v. *Pennsylvania Greyhound Lines,* 3rd Cir. 1951, 192 F. 2d 310. This was followed in *Pennsylvania Greyhound Lines* v. *Amalgamated Ass'n,* 3rd Cir. 1951, 193 F. 2d 327.

In the most recent of the Third Circuit cases which we have noted, it was said by a divided court that a collective bargaining agreement between an employer producing goods for subsequent sale in interstate commerce, as is the employer in the case before us, and a union, is within the meaning of a contract in an "industry affecting commerce" as used in Section 301 of the Labor Management Relations Act of 1947, but that such a contract is not one of "employment of . . . workers engaged in foreign or interstate commerce" within the exclusion clause of Section 1 of the Arbitration Act. A majority of the court reconciled the decision with the prior holdings by saying that the two Pennsylvania Greyhound Lines cases involved employees engaged in interstate transportation, excluded by Section 1, and that the other earlier cases involved employees producing goods for subsequent resale in commerce, and not covered, said the court, by the exclusion clause. Two of the judges thought that collective bargaining agreements were not "contracts of employment" within the purview of Section 1 of the Arbitration Act, and were of the belief that the Pennsylvania Greyhound Lines cases should be expressly overruled. Two judges dissented. The court directed the granting of a stay pending arbitration. *Tenney* v. *United Electrical R & M Workers,* 3rd Cir. 1953, 207 F. 2d 450.

[fol. 107] The Fourth Circuit departs from the Third Circuit and has held that the Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. Speaking for the Court and referring to Section 1 of the Arbitration Act, Chief Judge Parker has said:

> "Art. I of that Act of February 12, 1925, c. 213, as reenacted by the Act of July 30, 1947, c. 392, 9 U.S.C.A.

§1, contains nothing but definitions of 'maritime transactions' and 'commerce' and an excepting clause; and we think it clear that the excepting clause was intended to apply to the entire act." *International Union* v. *Colonial Hardwood Floor Co.*, 4th Cir. 1948, 168 F. 2d 33.

The Colonial Hardwood case was followed in *United Electrical R. & M. Workers* v. *Milier Metal Products*, 4th Cir. 1954, 215 F. 2d 221.

It seems to us that the Sixth Circuit originally reached the same conclusion as had been pronounced in the Fourth. In a well reasoned opinion by Judge Hamilton wherein the first Donahue case, *supra*, is criticized, it is said:

"The scope of the exception or proviso in the statute must be gathered from the view of the whole law, and if the language of the exception is in perfect harmony with the general scope of the entire statute, the exclusion is applicable to the whole act. It is clear that the exception here in question was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged [fol. 108] in interstate commerce. Section 2 of the Act makes valid and irrevocable all arbitration agreements in writing to submit to arbitration future controversies arising out of the contract of which the arbitration agreement was a part. It would be senseless to say that the exclusion from the Act covers the validity of the contract, but excludes the stay provision of Section 3. The reason for the exclusion is applicable to the entire Act. The language of the exclusion 'herein contained' is found in the first section of the Act. This section is made up entirely of definitions and exceptions to the operation of the title. 'Herein' as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used. The fact that it was used in the present Act in a section where none of the substantive matter set up in the succeeding sections of the Act appeared must mean that it is to be applied to the whole Act

and not to any given section. There can be no doubt that the contract in issue is a contract of employment. Appellant insists that the exception relates only to the subject specified in the title. If we give full weight to appellant's contention, its argument must fail because the title not only states that its purpose is to make valid arbitration contracts but also to make them enforceable. Section 3 sets up one of the methods of enforcement." *Gatliff Coal Co.* v. *Cox*, 6th Cir. 1944, 142 F. 2d 876.

[fol. 109] But in a later case from the Sixth Circuit the court notes the conflicts. It adhered to its earlier view that the exclusion proviso of Section 1 of the United States Arbitration Act applies to the entire act, but it held that the collective bargaining agreement before it was a trade agreement and not a "contract of employment" within the exclusion clause. *Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, etc.*, 6th Cir. 1954, 217 F. 2d 49.

As to the effect of the United States Arbitration Act in the case before us, we align ourselves with the Fourth Circuit and hold that the collective bargaining agreement before us is a "contract of employment" within the meaning of the Arbitration Act and as such is excluded from the application of the act by its express terms. The earlier cases and their effect are commended upon in 17 Law and Contemporary Problems 580, and 65 Harv. L. Rev. 1238. Though the Norris-La Guardia Act does not preclude, the United States Arbitration Act does not authorize the judicial enforcement of a contractual undertaking to submit to arbitration grievances arising under a collective bargaining agreement.

This brings us to the question of whether Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a), hereinbefore quoted, provides for the enforcement of a provision for arbitration contained in a collective bargaining contract between an employer and a labor organization of employees engaged in producing goods for subsequent sale in interstate commerce. The Court of Appeals of the Tenth Circuit has given us, as

[fol. 110] dictum perhaps, a succinct answer to the query. It said:

> "This statute [29 U.S.C.A. §185(a)] is for the purpose only of giving jurisdiction to the federal courts in cases involving labor contracts. It does not give the federal courts any different or additional power than a state court would have if the action had been brought there": *Mercury Oil Refining Co.* v. *Oil Workers Int. Union, CIO*, 10th Cir. 1951, 187 F. 2d 980.

In a decision from the Second Circuit it is stated:

> "But § 301 . . . created a remedy where none existed before and provided a forum in which to enforce it." *Shirley-Herman Co.* v. *International Hod Carriers, etc.*, 2d Cir. 1950, 182 F. 2d 806, 17 A.L.R. 2d 609.

In the Shirley-Herman case the remedy to which reference was made as being created by the statute was the right to sue a labor union as such and the right of unions to bring and maintain judicial actions. We think it unnecessary to consider other decisions of the Courts of Appeal or enter upon a review of District Court cases, of which there are a number. The answer to this phase of our inquiry is to be found, we think, in the opinions of the Supreme Court in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 1955, 348 U. S. 437, 75 S. Ct. 488, 99 L. Ed. (Advance p. 368).

Perhaps it cannot fairly be said that the ratio decidendi of the Westinghouse case is more than that a Federal District Court does not have jurisdiction under Section 301 [fol. 111] over an action brought by a union against an employer under a collective bargaining agreement on behalf of employees for wages which the employer refused to pay and which refusal the union asserted was in violation of the agreement. But in the several opinions we find a guide for our decision. Mr. Justice Frankfurter, with whose views Justices Burton and Minton concurred, found that if the "plain meaning" rule of construction could be applied, then all Section 301 does is to give procedural directions to the Federal courts to treat labor unions as

natural or corporate persons in actions involving collective bargaining agreements, and to do so regardless of the amount in controversy and not to require diversity of citizenship. In considering the intent of Congress, Mr. Justice Frankfurter found that its aim was to open the Federal Courts to such suits solely because they were between the union and employers, but without providing any Federal law other than procedural for such suits. "It was evident", said Mr. Justice Frankfurter, "that the specific desire was to remove procedural obstacles to suit by and against the union." He quoted Senator Taft, in proposing an amendment approximating §301, as saying:

> ". . . All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce and therefore involves a Federal question."

A question was raised by Mr. Justice Frankfurter as to whether the construction dictated by the "plain meaning rule" and by the intent of Congress could be placed within [fol. 112] the constitutional restriction of Federal jurisdiction to cases arising under the Constitution and laws of the United States, etc. U. S. Const. Art. III, §2. It was necessary, thought Mr. Justice Frankfurter, to limit the scope of the Act as "doubtful legislation". The Court of Appeals, in its consideration of the Westinghouse case, had proceeded upon the so-called "electric theory" that the collective bargaining agreement is not of itself a contract of hiring, that each employee makes with the employer a separate contract of hiring from which stems the obligation to pay wages, and that, while Section 301 creates "a federal substantive right", there is jurisdiction only of causes of action between a union and an employer. Since the Court of Appeals did not regard a breach of the obligation to pay wages as creating a cause of action in the union, it rejected Federal jurisdiction. *Association* v. *Westinghouse Electric Corp.* 3rd Cir. 1954, 210 F. 2d 623. Mr. Justice Frankfurter disagreed with the Court of Appeals, and indicated his view to be that no new federal law con-

cepts of contractual interpretation were intended by the enactment of Section 301.

Mr. Chief Justice Warren, joined by Mr. Justice Clark, concurred and were of the opinion that it was enough to say that Section 301 was not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the right of an employee to receive wages; and being of such opinion, they saw no reason to make labor policy or raise constitutional issues. Mr. Justice Reed also concurred in the result. He took the position that it was the intent of Congress to give federal jurisdiction over actions arising from breaches of collective bargaining agreements [fol. 113] whether the rules of substantive law are derived from federal or state sources. He concluded, as did the Court of Appeals, that a breach of the duty to pay wages was a violation of an individual employment contract and not of the collective bargaining agreement.

In a dissenting opinion in the Westinghouse case, Mr. Justice Douglas, with whom Mr. Justice Black concurred, there was disagreement with the majority refusal to permit the Union to bring the suit. The minority did, however, concur in the view of Mr. Justice Reed that Congress "created federal sanctions for collective bargaining agreements, made cases and controversies concerning them justiciable questions for the federal courts, and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for the construction and interpretation of those collective bargaining agreements".

We have, in the case before us, a complaint by the Union that the Employer has breached a provision of a collective bargaining agreement. Out of such complaint arise a case and controversy of which the Federal courts have jurisdiction under the Constitution as implemented by Section 301. And see 28 U.S.C.A. §1337. But it does not follow that because jurisdiction is given to Federal courts, there is a new federal law concept that authorizes the courts to enforce submission to arbitration. Before such a result is reached, we must find a rule of law derived from state or Federal sources. We do not think it matters whether a

right to enforce submission to arbitration is or is not substantive, as was considered in *Bernhardt* v. *Polygraphic Company of America*, 2nd Cir. 1954, 218 F. 2d 948; or [fol.114] whether as said by Mr. Justice Brandeis, there is "the substantive right created by an agreement to submit disputes to arbitration", which he said "is recognized as a perfect obligation." *Red Cross Line* v. *Atlantic Fruit Co.*, 1924, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582.

Finding nothing of Federal origin or in the laws of Alabama, of either common law or statutory enactment, or from any other source, that requires or permits, or from which we might, in the language of Mr. Justice Douglas, fashion a rule requiring or permitting, the enforcement of the covenant for arbitration of grievances, and concluding that Section 301 does not of itself provide or furnish the source for such a rule, we hold that there is no legal right to the relief sought.

In the determination of the case before us, it was held that, since the grievances arose while the collective bargaining agreement was in effect, the Employer was required to arbitrate such grievances subsequent to the termination date of the agreement. Although unwilling to adopt the most recent conclusions of the Third Circuit in construing the United States Arbitration Act, we are impressed by its views with respect to the effect of the termination of a collective bargaining agreement upon Section 301 procedure. After reciting the giving of notice of termination and the failure of negotiations toward a new contract between an employer and a union, the court said:

> "The old contract thereupon terminated pursuant to the permitted election already made manifest by [fol. 115] timely notice as provided in the document itself. The obligation not to strike, like the other obligations of the contract ceased to exist. For this reason the complaint was properly dismissed". *Paterson Parchment Paper Co.* v. *International Brotherhood*, 3rd Cir. 1951, 191 F. 2d 252.

Finding as we do that compliance with a covenant for arbitration in a collective bargaining agreement will not be compelled by a Federal court judgment where the courts

of the state would deny such relief, it follows that there was no enforceable right which could have been either retained or lost upon the termination of the agreement. Hence we need not and do not decide whether such a covenant would survive where, under the applicable law, such a provision might have been enforced during the term of the agreement.

It is the view of this Court that the District Court erred in not sustaining the defendant's motion to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted. Therefore, with a direction to sustain the motion to dismiss, the judgment appealed from is

Reversed.

BROWN, Circuit Judge, dissenting:

The majority declares plainly that the District Court had jurisdiction. It does that on the basis of §301. With this I am in complete agreement. But applying the rationale [fol. 116] of Mr. Justice Frankfurter's opinion as though it was all that was said by a court of eight, §301 is confined rigorously to the procedural concept. Finding neither state nor federal statute (apart from §301) authorizing injunctive enforcement of the agreement to arbitrate, the majority concludes that the court with power is yet powerless to proceed—it has power but no tools—in short, the door is opened but the hall is empty. I decline to believe that power is so sterile or that §301, if needed to bridge any gaps, exhausts itself by opening the door.

On jurisdiction I would spell out what seems implicit in the majority opinion: This is, on all tests, a *union* controversy in which the union is asserting in its collective capacity a demand relating to all of the employees as a group, on the one hand, and the employer, as such on the other. It is not the assertion, through name or guise of the union, of a single claim for one or the aggregation of many single claims for all arising under the individual contracts of employment, as such, between employee and employer. Arbitration, as the last step in the grievance machinery,

is in explicit terms the undertaking[1] of union and employer, and by its nature, its force and hence effectiveness, is [fol. 117] derived from employer and union pledging that each will be bound. It is, we all agree,[2] therefore a case for §301.

What law was then to be applied? Side-stepping the engaging prospect of divining the mathematical probabilities of decision on this point amongst Justices splitting

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[1] Article VIII prescribes the steps. In Step 1 between Room Steward and department Overseer, Step 2 General Shop Committee and Mill Superintendent, the aggrieved employee may, "in his discretion" accompany the union representatives; but in Step 3 between the union and a representative of Employer's executive management and in Step 4 (adopting arbitration under IX(F)), it is strictly between union and employer.

Article IX(A) states: "The employer and the union agree that the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances * * *. It is the desire of the Union and the Employer to avoid strikes and work stoppages." Sub-paragraphs (B), (C), (D) and (E) contain a precise set of rules for the consequences of strikes, wildcat strikes, slowdowns, and other stoppages in disregard of the agreement to exhaust grievance machinery, including arbitration.

Sub-paragraph (E) makes it clear that both parties thought this was a §301 contract as the employer releases the union from liability for damages on the part of the union, its officers, agents or members "for breach of contract of any kind or character whatsoever" in consideration of the union's agreement to make the grievance machinery effectual.

[2] Our case International Molders etc. v. Western Foundry Company No. 15235, decided March 30, 1955 (remanded, per curiam, to dismiss for lack of jurisdiction); certiorari denied November 7, 1955, 24 Law Week 3126, applied *Westinghouse* to claim by union for wage increases due employees; Ferguson-Steere Motor Co. v. International Brotherhood etc., 5 Cir., 223 F.2d 842, held that §301 could not be used to by-pass the National Labor Relations Board.

on a 3-2-1-2 combination, the court determines that under neither Alabama nor Federal law is there a right to enforce arbitration.

I am willing here to accept this cautious approach and assume that Alabama[3] will not specifically enforce an agreement to arbitrate and that the United States Arbi- [fol. 118] tration Act, 9 U.S.C. 1, is not available[4] or effective to supply the federal statutory mechanics for arbitration.

But the studied search for a federal statute, the painstaking analysis of the cases under it, demonstrates, I think, a misconception of the fundamentals. It is as though we were dealing with a court having statutory power only. But that is not the case. The United States District Court.

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[3] Alabama may be reluctant as to remedy but not as to general validity. Alabama's constitution and statutes contain provisions indicating a public policy favorable to arbitration in general and spelling out in detail a system and procedure of arbitration. Code of Alabama, Constitution of 1901, Article 4 §84; Code of Alabama Title 7 §829 (formerly 2908) thru §844 (formerly 2923). §844 states that the statute is cumulative rather than restrictive, but §829, 830, and 831 may indicate that the statute and public policy are limited to agreements to arbitrate specific disputes already arisen and do not comprehend agreements for arbitration of future disputes. See Headley v. Aetna Insurance Co., 202 Ala. 384, 80 So. 466, 467; Ex parte Birmingham Fire Insurance Co. (Sup. Ct. Ala.) 172 So. 99, 101; Caldwell v. Caldwell, 157 Ala. 119, 47 So. 268, 269.

[4] See, The Federal Enforcement of Labor Arbitration Agreements, Seymour Phillip Kaye, New York University Sixth Annual Conference on Labor, 1953, p. 207, a detailed discussion of this problem and legislative history of the Arbitration Act; Legal Aspects of Labor Arbitration, Lee Epstein, New York University Second Annual Conference on Labor, 1949, p. 383 at 388; Labor Arbitration—The Arbitrable Issue, Ralph E. Kharas, Fifth Annual Conference on Labor, 1952, pp. 633, 637, 638; Legal Status of Labor Arbitration, Jesse Freidin, New York University First Annual Conference on Labor Law, 1948, 233, 247, 251.

is a constitutional organ with the intrinsic capacity to grant traditional coercive relief as the cause over which it has jurisdiction may require. *Williamson* v. *Berry*, 8 How. 495, 536, 12 L.Ed. 1170, 1187, "Jurisdiction in chancery is inherent and original, comprehending now almost every exigency of human disagreement, for which there is not an adequate remedy at law."

Judge Goodrich in the recent opinion in *Johnson, Warden* v. *Marsh*, No. 11,713 (November 30, 1955) . . . . . F.2d . . . . not yet reported, finding ample inherent power to grant bail even though no statute can be found described both this full power to act once the court acquires jurisdiction [here by virtue of §301] and the basic misconception that the district court can do only that which some statute permits:

> "The statement is often made that the inferior courts of the United States are courts of limited juris- [fol. 119] diction. This is a truism in one sense. These courts are competent to act in such cases, and only in such cases, as the Congress, pursuant to the Constitution, assigns to them. And unless constitutional provisions stand in the way, the assignment may be varied at the will of Congress. But within the area of activity assigned to them, Federal courts are courts of full stature, and we may rightly look to common law concepts and precedents to see the scope of the implied or 'inherent' authority which the judicial office carries with it. * * * We believe that the basic misconception in those decisions denying this authority lies in their view that since Federal courts have limited, statutory jurisdiction, their powers in proceedings involving this jurisdiction are necessarily limited and must be statutory. See Principle v. Ault, 62 F.Supp. 279, 282 (N.D. Ohio 1945). This, as already indicated, is not our view of the matter."

The remedy sought here is common and traditional—the equity injunction to compel or restrain action because of the inadequacy of the usual money damage. Its availability need find no source, as such, in specific statute. Indeed, it

has been the frequent instrument of effectual sanction for enforcement of the policy of statutes.[5] Since power is present and a traditional tool is available and effective, is there an obstacle to their full use? There is clearly no

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[5] The equity injunction has been a potent weapon to effectuate declared policy in the field of labor relations against severe attacks that the statute reflecting such policy [here it would be the Taft Hartley Act] was silent on such sanction: Texas & New Orleans Railroad Company v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548; 74 L.Ed. 1034; Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 551, 81 L.Ed. 789, 801, "In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace." Steele v. L. & N. Railroad Co., 323 U.S. 192, 89 L.Ed. 173; Tunstal v. Brotherhood of L.F.&E., 323 U.S. 210, 89 L.Ed. 187; Graham v. Brotherhood of L.F.&E., 338 U.S. 232, 94 L.Ed. 22; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 96 L.Ed. 1283.

See for other statutes: United States v. F. O. Morgan, 307 U.S. 183, 194, 83 L.Ed. 1211, 1218, 1219; Porter v. Warner Holding Company, 328 U.S. 395, 398, 90 L.Ed. 1332, 1336, 1337; Hecht Co. v. Bowles, 321 U.S. 321, 329, 331, 88 L.Ed. 754, 760, 761; Federal Power Commissioner v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 500, 93 L. Ed. 1499, 1502; Federal equity court grants or withholds its injunction to effectuate public policy, Hurd v. Hodge, 334 U.S. 24, 34, 35, 92 L.Ed. 1187, 1195.

This power to use a traditional federal equity remedy is so pervasive as to be available in diversity actions where, in a comparable situation, the local state court would not, or could not, grant equitable relief: see Guaranty Trust Co. v. York, 326 U.S. 99, 106, 89 L.Ed. 2079, 2084, 2085.

Federal equity court has great flexibility in molding relief in cases over which it has jurisdiction with all powers of the Court of Chancery: Sprague v. Ticonic National Bank, 307 U.S. 161, 164, 165, 167, 83 L.Ed. 1184, 1186, 1187;

[fol. 120] statutory[6] proscription, and an accurate treatment of historical precedent reveals no self-generated decisional policy against its use. Despite the flood of words that ordinarily executory contracts to arbitrate will not be specifically enforced, this reflects no federal policy of hositility to arbitration as such. On the contrary, arbitra-
[fol. 121] tion is given enthusiastic federal sanction[7] and where a general Congressional policy is plainly indicated that such a mechanism will be useful in effecting its legis-

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Barber v. Barber, 21 How. 582, 592, 16 L.Ed. 226, 229; it could hardly have this wide capacity were it required to find statutory basis for the remedy, its availability or use.

See also following which affirm an inherent power in a Federal Court to act: Wright v. Henkel, 190 U.S. 40, 63, 47 L.Ed. 948, 956; United States v. Hudson and Goodwin, 7 Cranch 32, 34, 11 U.S. 21, 23, 3 L.Ed. 259, 260; United States v. Shipp, 203 U.S. 563, 572, 573, 51 L.Ed. 319, 323.

[6] We are in accord that Norris-LaGuardia Act, 29 U.S.C. 101, does not forbid relief here. See also Textile Workers Union v. American Thread Co., D.C.Mass., 113 Fed.Supp. 137; Local 207 v. Landers, D.C.Conn., 119 Fed.Supp. 877; Milk and Ice Cream Drivers v. Gillespie Milk Products Corp., 6 Cir., 203 F.2d 650; Textile Union of America v. Aleo Mfg. Co., D.C.N.C., 94 Fed.Supp. 626; United Textile Workers v. Goodall Sanford, D.C.Me., 131 Fed.Supp. 767. Contra: Mead v. International Brotherhood, 1 Cir., 217 F.2d 6.

[7] The federal approach has not been that of many jurisdictions which, with jealous eye, scanned all such devices lest they infringe upon or oust the courts from their historic role. Judge Hough, in United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd., S.D.N.Y., 222 Fed. 1006, 1007, characterized it: "* * * A more unworthy genesis cannot be imagined." See Mr. Justice Story's comments from Tobey v. Bristol County, Fed. case #14065 quoted footnote 1 Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120, 68 L.Ed. 582, 585, and Mr. Justice Brandeis continued: "But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages.

lative aim, equity has the power, and the right, in the public interest, to make arbitration effective.[8]

[fol. 122] Clearly, arbitration is a welcome device to Congress. Indeed, the Arbitration Act itself, 9 U.S.C. 1, reflects a determination that the needs of the business and industrial world would be aided by giving procedural certainty and greater vitality to the use of voluntary non-court means of settling disputes. The express exclusion of "contracts of employment" is no left-handed, reverse reinstatement

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Hamilton v. Home Ins. Co., 137 U.S. 370, 385, 386, 34 L.Ed. 708, 713 * * *. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity. Karthaus v. Yallas Y. Ferrer, 1 Pet. 222, 7 L.Ed. 121; Burchell v. Marsh, 17 How. 344, 15 L.Ed. 96; Bayne v. Morris, 1 Wall. 97, 17 L.Ed. 495. And, although there is no federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. Hecker v. Fowler, 2 Wall. 123, 17 L.Ed. 759."

The court in Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 277, 76 L.Ed. 282, 290, sustaining the United States Arbitration Statute characterized compulsion of arbitration as "one of remedy only."

[8] Virginia Railway Co. v. System Federation No. 40, supra, at 552, "* * * The peaceable settlement of labor controversies, * * * is a matter of public concern. * * * Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved * * *. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, Tobey v. Bristol County (C.C.) 3 Story, 800, Fed. Cas. No. 14,065, supra, enforce statutes commanding performance of arbitration agreements. Red Cross Line v. Atlantic Fruit Co. * * *; Maritime Transit Co. v. Dreyfus * * *."

of the ancient attitude of hostility—"contrary to public policy." Rather, the difficulties encountered by the Third, Fourth and Sixth Circuits in attempting to adapt that statute to the field of labor problems covered so long by special legislation bespeaks, perhaps, a Congressional prescience.

But Congress has been much more direct in its blessing. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, is a detailed framework of voluntary conciliation and mediation with arbitration awards being final, binding and legally enforceable.[9] This same scheme is duplicated for airline carriers, 45 U.S.C. 181, *et seq.* Moreover, the Labor Management Relations Act of 1947 contains the positive declaration that it is the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation * * * can most satisfactorily be secured * * *" by settlement of issues between employers and employees by conciliation, mediation, and voluntary arbitration. This is stated, not alone in categori- [fol. 123] cal terms, 29 U.S.C. 171 through 178, but the public interest is so direct that the statute establishes the Federal Mediation and Conciliation Service, an independent agency, as an arm of the Government operating at public expense.[10]

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[9] The Adjustment Boards, §153, are in reality bipartisan arbitrations whose awards are final, 153 First (m) and enforceable within two years by court petition (p) (q); §157 provides for arbitration of disputes not settled by mediation or Board of Adjustment under §§151-156, and under §158 (1) awards are binding, are filed (k) in the Federal District Court where, under §159 the award is conclusive and on which the court shall enter judgment unless set aside for one of three limited, specific grounds.

[10] Governmental assistance through the Mediation Service is specifically directed to settlement of differences by mutual agreement through conference, collective bargaining, "or by such methods as may be provided for in any applicable agreement for the settlement of disputes" (§171); this is spelled out further in 173 (d), "Final adjustment by a method agreed upon by the parties is declared

In every modern piece of labor legislation, the Congress has either directed the establishment of arbitration systems or has recognized the essential desirability of their existence with the full force of the Government, its prestige, and its treasury behind them as an essential device for maintenance of industrial peace. In such an atmosphere it contradicts all that Congress has done to resurrect the [fol. 124] bones of an ancient day to find some supervening notion that arbitration agreements, while tolerated to the point of acceptance once completed, are inherently evil and beneath the claim of right which the Chancellor will affirmatively protect.

The power exists over parties and cause by §301. The

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to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

See, Legal Aspects of Labor Arbitration, Epstein at p. 389, cited footnote 4, *supra;*

Forkosch, Treatise on Labor Law, 1953, 476-488, in a detailed analysis suggests that the policy on arbitration is so strong that it might even be compulsory, at least in satisfying the conditions precedent to a Norris-LaGuardia injunction. This is certainly the plain holding of Brotherhood of Railway Trainmen v. Toledo, Peoria, and Western Railroad, 321 U.S. 50, 88 L.Ed. 534, and its rejection of the holding of this Court, Mayo v. Dean, 5 Cir., 82 F.2d 554 (see Supreme Court discussion at 321 U.S. 61, 88 L.Ed. 541). The words of §108 (29 U.S.C.A. 108) are categorical that it is the policy of Congress that, "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or *voluntary arbitration*" shall be made. Inscribed so plainly and announced for such a length of time (since 1932), it seems unlikely to think that Congress must spell it out again.

See United Office and Professional Workers of America v. Monumental Life Ins. Co., E.D.Pa., 88 Fed.Supp. 602, 607.

remedy sought is traditional, common and effective. There is no policy against its use and there is overwhelming evidence of a Congressional purpose to encourage, facilitate and make effectual all of the collective processes of bargaining, conciliation, mediation and arbitration. On this approach it is the use of the federal power, a federal remedy to effectuate a federal policy. There is no need to draw upon state jurisprudence with the constitutional uncertainties involved.

Moreover, this gives a cohesive consistency to the total federal labor picture. Federal constitutional power is amply present under this very Labor Management Relations Act to require employer and employees to bargain in good faith on the inclusion[11] of an agreement to arbitrate in the bargaining contract and to issue necessary coercive orders to effectuate it, to protect parties from charges of unfair labor practice[12] and deny reinstatement[13] to displace strik-

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[11] 29 U.S.C. 158 (a)(5). In NLRB v. Corsicana Cotton Mills, 5 Cir., 179 F.2d 234, 235, a contempt proceeding for violation of cease and desist order, we exerted a supervisory administration of the collective bargaining process, one of the points in controversy being the arbitration clause. See NLRB v. American National Insurance Co., 343 U.S. 395, 407, 408, 96 L.Ed. 1027, 1038, 1039, requiring, but finding, good faith negotiation on the issue of a "management functions clause" versus "unlimited arbitration clause."

[12] See Timken Roller Bearing Co. v. NLRB, 6 Cir., 161 F.2d 949. Without invoking grievance machinery including arbitration for layoff of ten employees, union struck, employer refused further to entertain grievances and Board found employer guilty of unfair labor practice for failure to bargain; the court reverses holding that to require compliance with the contract including the agreement to submit to arbitration is the essence of collective bargaining in good faith; likewise, it held the union strike over a demand against subcontracting unlawful since the question whether subcontracting was or was not within the "management functions clause" was itself an arbitratable issue.

See also, NLRB v. Standard Oil Co., 6 Cir., 196 F.2d 892.

[13] W. L. Mead, Inc., 113 LRB 109, 5 CCH Labor Law Re-

[fol. 125] ers where the strike is a breach of the agreement to arbitrate.

Arbitration is now the usual, almost universal mechanism to assure industrial peace during the life of the contract. Unlike its frequent use in commercial fields as a substitute for the costly delays and uncertainties of court litigation, the device is adopted in labor relations as a substitute for the economic pressures each can marshal in the strike or lockout, or the threat of either.[14] It would be incongruous

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ports (4th Edition), par. 53162, Labor Law Journal, October 1955, Vol. 6 No. 10, p. 721; 20 employees walked off job, established a picket line to enforce demands concerning definition of duties and working hours of a truck driver after employer requested arbitration pursuant to arbitration clause in bargaining agreement. General Counsel brought complaint for refusal to rehire; Board reversed Trial Examiner and held employer could lawfully discharge the strikers. The Board stated: "* * * There can be no question but that in the case before us the grievance and arbitration clause * * * is a material provision of that agreement. * * *. We find that [the contract] * * * excluded any other means but arbitration for the resolution of disputes, particularly unilateral action by any party * * *.

"Every encouragement should be given to the making and enforcement of such clauses. * * * To hold that a strike in furtherance of such a material breach of a clear and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Courts of Appeals and the Supreme Court."

[14] As perhaps unique proof of its unpartisanship arbitration has the rare distinction of being praised and feared by management and labor alike. Peter Seitz, a management representative, in The Enforcement of Collective Bargaining Contracts By Arbitration, New York University Sixth Annual Conference on Labor, 1953, p. 15, describes it: "The first fact to note is that arbitration is what I call a 'glandular' word. By that I mean that the mere articulation of the word causes thyroid and adrenal glands to secrete. Mention the term and calm men get bloodshot eyes; pulses throb and

[fol. 126] indeed to find difficulty or even doubt, that a sovereign which can constitutionally compel the parties seriously in good faith to negotiate for an agreement to arbi- [fol. 127] trate, and punish and coerce them into compliance with it by administrative orders, sanctions or the denial of them with the added prestige of court approval by appellate review, will lack the power when its constitutional court is asked to grant a traditional remedy which will have the same end.

If I am mistaken that the network of federal labor legislation is the culture in which the Congressional policy of encouraging effective enforcement of arbitration can grow into a basis for an equity court granting an injunction, I would nonetheless reach the same result by using, for the

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temperatures rise. This is specially interesting because the identical, violent, physical and emotional reactions will be observed in both management and labor representatives * * * [the] attitude toward arbitration is not unlike that of George Wither, the Restoration poet, who impatient with the conspicuous lack of affection demonstrated by his lady-love proclaimed:

> " 'If she be not so to me,
> What care I how fair she be?' "

The widespread use commenced during the war days under the National War Labor Board and was stimulated later by the President's National Labor-Management Conference of 1945 attended by delegates representing AFL, CIO, Mine Workers, Railway Brotherhoods, United States Chamber of Commerce, National Association of Manufacturers which recommended final determination of grievances involving the interpretation or application of the collective bargaining agreement by an impartial chairman, arbitrator, or board, the decision of which should be final and binding on both, with specific machinery agreed to on the selection of the arbitrator (the agreement in this case tracks it closely). U. S. Department of Labor, Division of Labor Standards Bulletin No. 77, pp. 42, 43, 1946. A study made by the Bureau of National Affairs, Inc., 1950, indicated that at least 80% of the collective bargaining agreements in the nation's important industries provided for

first time, §301 in a modified substantive way. I do this since I believe that §301 is much more than a mere photo-electric cell to open wide the door as union-employer, *vis-a-vis*, approach. When a genuine *union* controversy, i.e., a 301 suit comes before it, the combinations of dissenting and concurring opinions in *Westinghouse* will, I believe, restore sufficient vitality to §301 to enable it to reflect federal policy itself and reach out comfortably, as the occasion may require, into state and federal concepts to fashion the controlling law. Whether this will be the creation of new federal rights or merely the release of its nascent powers, this reading of §301 would say to the district court that if there has been a breach of the collective bargaining agreement it shall exert whatever of its traditional weapons—the money judgment, the declaratory pronouncement, or the equity injunction—which will best assure contractual compliance.

Difficulties in forging a responsive jurisprudence neither indicate nor foretell a constitutional void, and it seems [fol. 128] surprising at this late date that our flexible judicial apparatus, because of the likelihood of conflict with

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arbitration as the terminal point of the grievance machinery. See, How Arbitration Works, Elkourie, 1952, The Bureau of National Affairs, Inc., pp. 6-10; Arbitration and Arbitration Provisions, J. Noble Braden, Tribunal Vice-President, American Arbitration Association, New York University Second Annual Conference on Labor, 1949, 355, 365. There has been a steady growth in percentage of agreements to arbitrate, from 73% in 1944 to 83% in 1949, Arbitration Provisions in Union Agreements in 1949, James Nix, Monthly Labor Review, February 1950, pp. 160-165, to approximately 91% in 1942, Arbitration Provisions in Collective Agreements, 1952, Ernestene M. Moore and James Nix, Monthly Labor Review, U. S. Department of Labor, Bureau of Labor Statistics, March 1953, pp. 261-266. The value of arbitration in the workaday handling of labor relations is attested by the practice of making formal, written arbitration reports which are indexed, digested and reported. See, Labor Arbitration Reports, The Bureau of National Affairs, Inc., approximately 21 volumes published.

local law, should shrink from the necessity. The federal system has so well demonstrated its fluid capacity[15] that, applying its rule, doctrines frequently ignore, often reject, and frequently collide with local (state) principles[16] and, where needed to effectuate Congressional will, the

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[15] The federal courts have fashioned suitable federal principles in countless situations to effectuate multiple federal policies: Tort rules under Federal Employers Liability Act, Jesionowski v. Boston & M. R. R., 329 U.S. 452, 91 L.Ed. 416, Central Vermont Ry. Co. v. White, 238 U.S. 507, 59 L.Ed. 1433; The Jones Act, 46 U.S.C., 688, Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 83 L.Ed. 265; Laches in the enforcement of federal rights, Holmberg v. Armbrecht, 327 U.S. 392, 90 L.Ed. 743; Government contracts, Priebe & Sons v. United States, 332 U.S. 407, 92 L.Ed. 32, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 92 L.Ed. 10; Federal negotiable instruments and bonds, Clearfield Trust Co. v. United States, 318 U.S. 363, 87 L.Ed. 838, National Metropolitan Bank v. United States, 323 U.S. 454, 89 L.Ed. 383, Continental American Bank & Trust Co. v. United States, 5 Cir., 161 F.2d 935, D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 86 L.Ed. 956; Problems incident to National Banking System, Deitrick v. Greaney, 309 U.S. 190, 84 L.Ed. 694; Liabilities in performance interstate transportation contracts, O'Brien v. Western Union Telegraph Co., 1 Cir., 113 F.2d 539; and see Moore's Commentary on the United States Judicial Code, 1949, pp. 340-359, revealing, in detail, the development of a full body of law adequate to give life to federal policy.

[16] Spectacular illustrations are found in the field of federal taxation: Burnet v. Harmel, 287 U.S. 103, 77 L.Ed. 199, property status oil lease under local (Texas) law rejected; Burk—Waggner Oil Association v. Hopkins, 269 U.S. 110, 111, 114, 70 L.Ed. 183, 185, state law disregarded in determining status of group as partnership or corporation for income tax purposes; Lyeth v. Hoey, 305 U.S. 188, 83 L.Ed. 117, nature of interest under inheritance.

Similarly, state standards on existence of independent contractor relationship and the common law concept of direction and control, are frequently rejected: Rutherford

[fol. 129] conflict and collision[17] may occur between two federal statutes or policies.

The agreement to arbitrate, for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which §301 sought to answer. If it is not available here, then nought[18]

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Food Corp. v. McComb, 331 U.S. 722, United States v. Silk, 331 U.S. 704, Harrison v. Greyvan Lines, 331 U.S. 704, 715, 719; NLRB v. Hearst, 322 U.S. 111, 124-133.

[17] The same situation or circumstance frequently produces diverse results: e.g., direction and control of trucks, adequate to create genuine independent contractor relationship under Wage & Hour Law, and Social Security Law, United States v. Silk, 331 U.S. 704, Harrison v. Greyvan Lines, 331 U.S. 704, is insufficient to make physical performance by owner-drivers of trucks "transportation" under National Transportation Act, 49 U.S.C. 301, United States v. Rosenblum Truck Lines, 315 U.S. 50, 86 L.Ed. 671, Thomson v. United States, 321 U.S. 19, 88 L.Ed. 513; a crew member of a non-self-propelled dredge is a "seaman" under the Jones Act, 46 U.S.C. 688, McKie v. Diamond Marine Co., 5 Cir., 204 F.2d 132, but not a "seaman" under the Wage & Hour Act, Walling v. W. D. Haden Co., 5 Cir., 153 F.2d 196, Cert. Den. 328 U.S. 866, 90 L.Ed. 1636; Towing of barges physically performed by chartered tug is not "transportation" by tug owner-operator under the Interstate Commerce Act, 49 U.S.C. 901, 909 (a), De Bardeleben Coal Corp. v. United States, W.D.Pa., 54 Fed.Supp. 643, affirming Union Barge Line Application, 250 I.C.C. 689, but is "transportation" for transportation tax under 26 U.S.C. 3475 (a), Gulf Coast Towing Co. v. United States, 5 Cir., 196 F.2d 944.

[18] The court's action in International Ladies' Garment Workers, etc. v. Jay-Ann Co. No. 15,636, with this one, chipping away from §301, adds only to the uncertainty. The court finds no jurisdiction to enforce the agreement to make payments by employer to the union's welfare fund. I would disagree with it as well: That, too, seems to me to be a genuine *union* controversy; and finding no jurisdiction it is actually in conflict with the majority here.

is left of §301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used.

[fol. 130] The injunctive order to compel arbitration was right and should be affirmed.

I therefore respectfully dissent.

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[fol. 131] No. 15697

LINCOLN MILLS OF ALABAMA,

Versus

TEXTILE WORKERS UNION OF AMERICA, CIO

JUDGMENT—January 31, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed with a direction to sustain the motion to dismiss;

It is further ordered and adjudged that the appellee, Textile Workers Union of America, CIO, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"BROWN, Circuit Judge, dissenting."

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[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29, 1956.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of April, 1956.

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[fol. 134] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this application.

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FILED
JUN 23 1956
HAROLD B. WILLEY, Clerk

No. 211

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

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TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**Statutes:**


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**Cases:**


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*International Longshoremen's Union* v. *Libby, McNeill & Libby*, 114 F. Supp. 249 (D. Hawaii, 1953) affirmed on other grounds, 221 F. 2d 225 (9th Cir., 1955) ..... 10

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*Milk and Ice Cream Drivers* v. *Gillespie Milk Prod. Corp.*, 203 F. 2d 650 (1953) ..... 10

*Newspaper Guild* v. *Herald-Traveler*, 38 LRRM 2031 ..... 6

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*Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass., 1953) ..... 11

*Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955) ..... 13

*Textile Workers Union* v. *Aleo Manufacturing Co.*, 94 F. Supp. 626 (N.D. N.C., 1950) ..... 9

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

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No.

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TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 31, 1956.

## OPINIONS BELOW

The District Court did not issue an opinion. Its Findings of Fact and Conclusions of Law (R. 77-81) are set forth at pp. 77-81 of the record. The opinion of the Court of Appeals, which is reprinted in Appendix B hereto, pp. 19-40, is reported in 230 F. 2d 81.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1956. (R. 131). On April 19, 1956, an order extending the time for filing a petition for certiorari until June 29, 1956, was entered by Mr. Justice Burton. The jurisidiction of this Court is invoked under 28 U.S.C. § 1254(1).

SEC. 13. When used in this Act, and for the purposes of this Act—

* * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintainng, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

## QUESTIONS PRESENTED

1. The ultimate question presented by the decision of the Court of Appeals is whether a federal district court has authority, in a suit brought by a union under § 301(a) of the Labor-Management Relations Act, 1947, to compel compliance by an employer with his contract to arbitrate disputes arising under the collective agreement with the union.

2. Subsidiary questions, involved in determination of this ultimate question, are:

(a) Whether the court has jurisdiction over the suit under § 301(a).

(b) Whether the Norris-LaGuardia Act prevents the granting of the relief sought.

(c) Whether reference is to be made to state or federal law to determine the enforceability of contracts to arbitrate.

(d) Whether § 301(a) itself, in the content of the Labor-Management Relations Act, makes such contracts enforceable in the Federal Courts.

(e) Whether the United States Arbitration Act (9 U.S.C. §§ 1-14) is applicable and, if it would be otherwise applicable, whether a collective bargaining agreement is excluded from its coverage as a "contract of employment."

## STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, with-

# APPENDIX B

In the United States Court of Appeals
For the Fifth Circuit

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No. 15697

LINCOLN MILLS OF ALABAMA,
Appellant,

versus

TEXTILE WORKERS UNION OF AMERICA, CIO,
Appellee.

*Appeal from the United States District Court for the Northern District of Alabama.*

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(January 31, 1956.)

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Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Lincoln Mills of Alabama, the defendant below, is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and hence subject to Federal legislation relating to labor. Textile Workers Union of America, CIO, the plaintiff below, is an unincorporated association and labor organization. We will refer to the parties, for brevity and clarity, as Employer and Union.

In chronological sequence, the facts from which this controversy developed were as follows:

A written collective bargaining agreement between the Union and the Employer was executed June 27, 1953, to continue until July 3, 1954, and for one-year terms thereafter unless written notice of termination should be mailed by either party to the other sixty days prior to the end of the current term, in which event the agreement would terminate at the end of the current term. Article VIII of the agreement set up procedures to be followed in the adjustment of grievances, and provided that if a grievance had not been adjusted by the Article VIII procedures within the time specified,

out respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669, and of the Norris-La Guardia Act (29 U.S.C. §§ 101-115, 47 Stat. 70) are set forth in Appendix A (*infra*, pp. 15-18).

## STATEMENT

The petitioner, Textile Workers Union of America (hereinafter referred to as the Union), is a labor organization representing the employees of the respondent, Lincoln Mills of Alabama (hereinafter referred to as the Company). Lincoln Mills is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and is subject to the Labor-Management Relations Act, 1947.

In June, 1953, the parties entered into a collective bargaining agreement. This agreement covered wages, hours and other conditions of employment. In addition, it established a four-step grievance procedure under which any dispute "arising from the operation or interpretation of this Agreement" was to be processed (R. 21). The fourth step of this procedure was arbitration.

The Agreement provided that any "dispute between the Union and the Employer arising from the operation or interpretation of this Agreement which pertains to wages, rates or pay, hours of work or other conditions of employment which has not been satisfactorily adjusted" in the earlier steps of the grievance procedure could be submitted to arbitration by either party. The party desiring arbitration simply notified the other party within a specified time limit. Then, under the agreement, the parties were to confer and endeavor to agree upon the selection of an arbitrator. In the event of failure to agree, an arbitrator was to be chosen, by a pre-arranged method, from a list to be supplied by the American Arbitration Association. As a counterpart

to this grievance and arbitration procedure, the contract also contained an agreement that such procedures were adequate for fair and final determination of all grievances and that there should be no strikes, work stoppages or intentional slow-downs. (R. 23-24).

On June 23, and 24, 1954, 10 separate grievances were filed by the Union relating to the operation or interpretation of the collective bargaining agreement. These grievances were processed through the various steps of the grievance procedure set forth in the Agreement. They were finally denied by the Company in the third step of the grievance procedure on July 14, July 15 and July 22, 1954. The collective bargaining agreement had expired, pursuant to notice given under its terms, on July 3, 1954. (R. 78).

The Union requested the Company to submit the grievances to arbitration, as provided for in the collective bargaining agreement. The employer refused. (R. 79). The Union thereupon brought this suit against the Company asking for an order directing the Company to perform its obligation to arbitrate and asking, in addition, for damages.

The Company conceded the facts (R. 74) substantially as set forth above, and defended on two principal grounds: (1) that the contract had expired and hence the agreement to arbitrate could no longer be enforced, and (2) the court was without jurisdiction to grant the relief requested.

The District Court on April 29, 1955, issued its findings of fact and conclusions of law. (R 77-81). The Court concluded that it had jurisdiction and that the Union had a right to maintain an action to compel arbitration by virtue of the provisions of Section 301(a) of the Labor Management Relations Act of 1947. The expiration of the collective bargaining agreement, the Court held, did not relieve the Company of its obligation to arbitrate, particularly in view of the fact that the grievances were in fact processed up to the point of arbitration after the expiration of the Agreement. With respect to the claim for damages, the Dis-

trict Court held that the Union had not proven any damages and was not entitled to recover.

On the basis of these findings and conclusions, the District Court ordered the Company to comply with the arbitration provisions of the collective bargaining agreement (R. 81).

On appeal, the Court of Appeals reversed by a 2-1 vote, the opinion for the majority (R. 99, Appendix B *infra*, pp. 19-30) was delivered by Judge Jones, with Judge Rives concurring and the dissent (R. 115, Appendix B *infra*, pp. 30-40) by Judge Brown.

All of the judges were agreed that the District Court had jurisdiction over the suit under Section 301(a). They were also agreed that the Norris-LaGuardia Act did not prevent the issuance of the order which had been entered by the District Court.

The majority held, however, that in a suit brought under Section 301 an executory agreement to submit disputes to arbitration would not be specifically enforced in the absence of a showing that such agreements were specifically enforceable in the courts of Alabama. In reaching this conclusion, the majority first held, in agreement with the Fourth Circuit, and in disagreement with the Third and Sixth Circuits, that the U. S. Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. It then proceeded to consider whether Section 301(a) itself could be regarded as providing a basis upon which such agreements could be enforced. In the light of the opinions of the justices of this Court in the *Westinghouse* case, 348 U.S. 437, the majority concluded that Section 301(a) was procedural only and created neither a substantive right nor a substantive remedy.

Finding that neither the Federal common law nor the common law of the State of Alabama authorized the specific enforcement of agreements to arbitrate, the Court concluded that there was no basis upon which it could enforce

such an agreement in this case. In view of that holding, it expressly waived consideration of the question of whether the agreement to arbitrate could otherwise be enforced after the termination of the Agreement.

Judge Brown in his dissent assumed, with the majority, that Alabama would not specifically enforce an agreement to arbitrate. He also assumed that the United States Arbitration Act was not available to supply a federal remedy. He argued, however, that the injunctive relief sought was both common and traditional and that, in the light of the plain congressional policy in favor of arbitration in labor matters, Section 301 should be read as giving the Federal District Courts the traditional power to enforce compliance with a contractual commitment. He came to this conclusion, both in light of the entire network of Federal labor relations law, with its emphasis on the desirability of using voluntary arbitration as a substitute for industrial conflict, and by using Section 301 "in a modified substantive way". "The agreement to arbitrate," he said, "for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which § 301 sought to answer. If it is not available here, then nought is left of § 301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used." (R. 129; App. B *infra*, p. 40).

## REASONS FOR GRANTING THE WRIT

1. There is a square conflict between the decision of the Fifth Circuit in this case and the decisions of the Court of Appeals for the First Circuit in three cases decided on April 25, 1956. *UE* v. *General Electric Co.*, 38 LRRM 2019; *Newspaper Guild* v. *Herald-Traveler*, 38 LRRM 2031; *Goodall-Sanford, Inc.* v. *Textile Workers*, 38 LRRM 2033. In all of these cases, the unions brought suit under Section

301(a) to compel performance by employers of their agreements to arbitrate disputes arising under collective agreements. The First Circuit—in unanimous opinions by Chief Judge Magruder—held, contrary to the Fifth here, that the federal district courts do have authority to compel arbitration, irrespective of state law.[1] The court's opinion in the leading case, *UE* v. *General Electric Co.*, is reproduced in Appendix C to this petition (pp. 41-62 *infra*).

The issue on which this conflict exists is plainly one of the utmost importance. Agreements to arbitrate disputes arising under labor contracts are found in a majority of contracts today. Indeed, it is not too much to say that in most labor contracts the agreement to arbitrate, and the reciprocal waiver by the union of its right to strike during the term of the contract, constitute the essential foundation of the day-to-day relationship between the parties. True, in most cases the employer's promise to arbitrate is honored rather than breached, without any need for judicial intervention. And, it may be true that a breach of the agreement to arbitrate would constitute a sufficient breach of the entire agreement to reinstate the union's right to strike. But if Section 301(a) is to be read, as Congress said it should be, as providing legal sanctions for the enforcement of the mutual obligations of unions and employers in collective agreements, then surely the enforcement of an agreement to arbitrate is one of the most important functions which that section can perform.

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[1] The *General Electric* and *Herald-Traveler* cases arose in Massachusetts. The law of that State as to the enforceability of agreements to arbitrate was found by the First Circuit to be "not at all clear". The *Goodall-Sanford* case arose in Maine. The First Circuit, in accordance with its conclusion that the federal arbitration statute was applicable, did not examine the Maine law. It appears that agreements to arbitrate are not specifically enforceable under that law. *Brown* v. *Leavitt*, 26 Me. 251, 256 (1846). See Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arbitration Journal (N.S.) 5, 13 (1953).

Indeed, if the Fifth Circuit is correct in its holding here that agreements to arbitrate cannot be enforced in suits brought by unions under Section 301, then nothing is left of Section 301 but a grant of authority to the Federal Courts to hear suits by employers against unions for damages. This court has already held, in the *Westinghouse* case, 348 U.S. 437, that Section 301 does not encompass union suits, brought in the absence of an arbitration provision, to enforce the substantive articles of a collective bargaining agreement providing benefits to the employees. If Section 301 cannot be used by a union to enforce the employer's agreement to arbitrate with it concerning disputes arising during the term of an agreement then, as Judge Magruder said in the *General Electric* case, "there would be no significant use a union could make of § 301." For all substantial purposes the statute would be re-written, in the face of its language, as authorizing suits only against unions.

2. In addition to this square conflict between the First and Fifth Circuits on the ultimate question here presented, there are additional conflicting decisions by various district courts in other circuits on the same question. The following cases from other circuits have held, on one ground or another, that an agreement to arbitrate can be enforced in a suit brought under Section 301:

(D.C. Cir.) *Evening Star Newspaper Co.* v. *Columbia Typographical Union,* 124 F. Supp. 322 (D.C. 1954).

(2d Cir.) *Wilson Bros.* v. *Textile Workers Union,* 132 F. Supp. 163 (S.D. N.Y. 1954) appeal dismissed 224 F. 2d 176, cert. denied 350 U.S. 834.

(2d Cir.) *Local 207, UE* v. *Landers, Frary & Clark,* 119 F. Supp. 877 (D. Conn., 1954).

(3d Cir.) *Insurance Agents* v. *Prudential Insurance Co.*, 122 F. Supp. 869 (E.D. Pa., 1954) (relying on state law).

(4th Cir.) *Textile Workers Union* v. *Aleo Manufacturing Co.*, 94 F. Supp. 626 (M.D. N.C., 1950).

(6th Cir.) *U.A.W.* v. *Buffalo-Springfield Roller Co.*, 36 LRRM 2638 (S.D. Ohio, December 1954).

3. In addition to the conflict between the decision below and the decision of the First Circuit, and the district courts of other circuits on the ultimate question here, there are other conflicts between the circuits, and even within the circuits, on many of the subsidiary issues involved in the determination of that ultimate question.

(a) *Jurisdiction under § 301(a).* Both the First and the Fifth Circuit, in this case, agree that § 301(a) does grant Federal jurisdiction over the subject matter. There seems, however, to be a conflict within the Fifth Circuit itself on this question. In *International Ladies Garment Workers* v. *Jay-Ann Co.*, 228 F. 2d 632 (1956). a panel consisting of Judges Holmes and Cameron, with Judge Rives dissenting, concluded that there was no jurisdiction under Section 301 over a suit brought by a union to compel compliance with a provision in a collective bargaining agreement requiring payments to a welfare fund. The majority concluded that the proper meaning of this Court's *Westinghouse* decision was that there was no jurisdiction under Section 301 in the absence of a federal question. That decision, as Judge Brown noted in this case (Appendix B, p. 40), is squarely in conflict with the opinions of both the majority and the dissent here that the court had jurisdiction over the subject matter.

(b) *The Applicability of the Norris-LaGuardia Act.* The Fifth Circuit here, and the First Circuit in the *General Electric* case, agreed that the Norris-LaGuardia Act did

not prevent the granting of the relief sought. The relationship between the Norris-LaGuardia Act and equitable relief in suits brought under Section 301 has, however, been the source of much confusion and disagreement among other federal courts. The Sixth Circuit, in *Milk and Ice Cream Drivers* v. *Gillespie Milk Prod. Corp.*, 203 F. 2d 650 (1953) has held that the use of the word "suits" in Section 301 encompasses all varieties of suits and hence makes the Norris-LaGuardia Act inapplicable in its entirety to any injunctive proceeding brought under Section 301(a). The First Circuit, on the other hand, had earlier held that Section 301 does not modify the Norris-LaGuardia Act and that injunctive relief cannot be granted in a Section 301(a) suit in the face of the specific prohibitions of the Norris-LaGuardia Act. *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters,* 217 F. 2d 6 (1954). In the *General Electric* case, however, the First Circuit concluded that the specific interdictions of the Norris-LaGuardia Act were not applicable to a suit brought by a union to compel performance of an agreement to arbitrate.

Although no circuit has held to the contrary on this limited proposition, and the Fifth Circuit's decision here is in accord, there are, as Judge Magruder noted, two district court decisions in other circuits holding that the Norris-LaGuardia Act prevents the granting of any equitable relief in suits brought under § 301(a). *Associated Telephone Co.* v. *Communications Workers,* 114 F. Supp. 334 (S.D. Cal. 1953); *International Longshoremen's Union* v. *Libby, McNeill & Libby,* 114 F. Supp. 249, (D. Hawaii, 1953) affirmed on other grounds, 221 F. 2d 225 (9th Cir. 1955). In addition a district court in the Seventh Circuit has recently specifically held that the Norris-LaGuardia Act bars specific enforcement of an agreement to arbitrate in a suit brought by a union under Section 301(a). *United Steelworkers of America* v. *Galland-Henning Mfg. Co.*, 37 LRRM 2749 (E.D. Wisc., Mar. 12, 1956).

(c) *Whether Section 301(a) Is a Sufficient Statutory Basis Upon Which to Predicate Specific Enforcement of an Agreement to Arbitrate.* Both the Fifth Circuits here and the First Circuit in the *General Electric* case are in agreement that Section 301(a) itself does not provide a sufficient statutory authorization to permit specific performance of arbitration agreements. The dissenting opinion here, however, unlike the First Circuit decision, argues that Section 301(a), in view of the federal courts' general equity powers, is sufficient to warrant the granting of such relief without need for further statutory authorization. The district court opinions from the 2d, 4th, 6th and D.C. circuits cited on pp. 8-9 *supra,* as well as several earlier district court opinions in the First Circuit,[2] agree with this position and hold—contrary to the Fifth Circuit here and the First Circuit in the *General Electric* case—that Section 301(a) itself is a sufficient statutory authority to grant specific performance of an agreement to arbitrate. And the holding of the Court of Appeals for the Second Circuit in *Shirley-Herman Co.* v. *International Hod Carriers,* 182 F. 2d 806, 809 that Section 301 "created a remedy where none existed before and provided a forum in which to enforce it" certainly is in conflict, at least in principle, with the conclusion of the First and Fifth Circuits.

(d) *Whether the United States Arbitration Act Is Applicable.* On this question the circuits are in hopeless confusion. In the instant case, the Fifth Circuit aligned itself with the Fourth Circuit in holding that collective bargaining agreements are excluded from the provisions of the U. S. Arbitration Act by virtue of the exclusion, in Section 1 of the Act, of "contracts of employment." Appendix B, *infra,* p. 26; *United Electrical Workers* v. *Miller Metal Products, Inc.,* 215 F. 2d 221 (4th Cir. 1954).

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[2] *Textile Workers Union* v. *American Thread Co.,* 113 F. Supp. 137 (D. Mass., 1953); *United Textile Workers* v. *Goodall-Sanford, Inc.,* 129 F. Supp. 859 (D. Maine, 1955).

On the other hand, the First Circuit in the *General Electric* case has joined the Sixth Circuit in holding that the exclusion of contracts of employment does not apply to collective bargaining agreements. Appendix C, *infra*, p. 60; *Hoover Motor Express Co., Inc.* v. *Teamsters*, 217 F. 2d 49 (6th Cir. 1954).

The Third Circuit actually holds to a middle position. It considers a collective bargaining agreement as a contract of employment. *Amalgamated Association* v. *Pennsylvania Greyhound Lines*, 192 F. 2d 310 (1951). But it reads the exclusion in Section 1 as applying only to such contracts covering seamen, railroad employees, and other workers engaged directly in foreign or interstate commerce. *Tenney Engineering Co.* v. *United Electrical Workers*, 207 F. 2d 459 (1953). Therefore, in the Third Circuit's view, collective bargaining agreements covering workers engaged in an industry affecting commerce, but not directly engaged in transportation, would not be excluded by Section 1 of the Arbitration Act.

Assuming that the exclusion in Section 1 is not applicable, there remain two questions under the Arbitration Act: whether the Act, apart from the exclusion, is applicable at all to collective bargaining agreements not directly involving commerce, under Section 2, and whether the provision in Section 4 authorizing specific performance of an agreement to arbitrate applies in union suits brought under Section 301(a).

Section 2 of the Arbitration Act provides, in pertinent part, that a written agreement to arbitrate "in . . . . a contract evidencing a transaction involving commerce" shall be enforceable. There is no prior judicial authority as to whether a collective bargaining agreement covering employees engaged in an industry affecting commerce is a contract "evidencing a transaction involving commerce" other than this court's decision in *Bernhart* v. *Polygraphic Co.*, 350 U.S. 198, which seems to hold that it is not.

Assuming that such an agreement is a transaction involving commerce, however, there remains the further question as to whether the United States Arbitration Act can apply to give authority to compel specific performance of an agreement to arbitrate in a suit brought by a union under § 301(a). The relevant provision here is Section 4 of the Act, which seems to authorize specific performance of an agreement to arbitrate in cases where the district court would, save for the agreement to arbitrate, have jurisdiction over the merits. This Court in the *Westinghouse* case held that § 301 does not give jurisdiction over a suit by a union to compel compliance with the provisions of a collective agreement relating to compensation. This leads obviously to the question of whether a suit to compel arbitration of such disputes can come within the scope of Section 4 of the Arbitration Act. One district court in the Third Circuit has held that, for this reason, it lacks jurisdiction under Section 4 to compel arbitration of a dispute arising under a collective bargaining agreement as to compensation to be paid to employees. *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). The First Circuit, on the contrary, finds independent meaning in the promise of the employer to arbitrate and hence jurisdiction under Section 301(a), irrespective of the *Westinghouse* decision, over the union's complaint that the employer has breached that provision. And, the First Circuit concludes, the case is therefore one which falls within the terms of Section 4 of the Arbitration Act.

4. In sum, there is both conflict and confusion in the federal courts, not only as to the ultimate result reached by the First and Fifth Circuits as to whether agreements to arbitrate can be specifically enforced under Section 301(a) but also as to almost every one of the subsidiary steps in the reasoning required to hold either one way or the other on that question. The number of cases in which these questions are presented, and the variety of answers given by the

various federal courts, makes it clear that this case, even apart from the direct conflict between the First and Fifth Circuits, presents important questions of federal law which have not been, but should be, settled by this court.

## CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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# APPENDIX A

## STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

> SEC. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669, provides, in pertinent part, as follows:

> § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . .

The Norris-LaGuardia Act (29 U.S.C. §§ 101-115, 47 Stat. 70) provides, in pertinent part, as follows:

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking,

patrolling or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

* * *

the party presenting the grievance should be governed by the provisions of Article IX(F) of the agreement.

By Article IX of the agreement the parties agreed that the contract grievance procedures were adequate to provide a fair and final determination of all grievances arising under the terms of the agreement. The desire of the parties to avoid strikes and work stoppages was recited. Paragraphs (A) to (E) inclusive of Article IX contained "no-strike" provisions. In Paragraph (F) of Article IX, of the agreement it was provided that any disagreement or dispute, arising from the operation or interpretation of the agreement, pertaining to wages, rates of pay, hours of work or other conditions of employment which had not been satisfactorily adjusted within the time limited, might be submitted to arbitration by the giving of written notice within ten days after the expiration of the applicable time limit. It was further provided that if the parties did not agree upon an arbitrator, the American Arbitration Association should be requested to furnish the names of five qualified arbitrators and the parties should alternately strike one name each from the list until a single name remained and the person so designated should serve.

The Union filed with the Employer seven grievances on June 23, 1954, and three grievances on June 24, 1954, all of which were of the type specified in Article IX(F). The Employer followed the procedures of the agreement up to the point of rejecting the claims, the rejections being made at various dates on and subsequent to July 14, 1954. Pursuant to timely notice given pursuant to its terms, the agreement terminated on July 3, 1954. The Union requested the Employer to submit the grievances to arbitration pursuant to Article IX(F) of the agreement. The Employer refused to do so. Thereafter the Union brought this suit against the Employer asking that the Employer be required to submit the grievances to arbitration and praying for damages. The District Court declined to award damages to the Union, saying that none were proven, but decreed that the Employer submit the grievances to arbitration as provided in Article IX(F) of the agreement. Jurisdiction was found under §301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185.

Presented for our consideration are questions which may be substantive as well as procedural. Since there is no diversity of

citizenship apparent we are, at the outset, required to ascertain whether there is a basis for Federal jurisdiction. The Congress has provided that:

> "Suits for violation of contracts between employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties". Sec. 301(a) Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a).

This grant has given Federal courts jurisdiction for the consideration and determination of questions such as the one presented in this case. It has given to Federal courts the power to adjudicate, where a violation of a contract is asserted, causes of action between employers and labor organizations and to determine whether or not a cause of action exists in a particular case. It does not follow, though, from the existence of the judicial power to determine a cause of action or controversy that the right asserted has legal sanction. It does not follow from the grant of jurisdiction to hear a litigant in a Federal forum that rights have been created or remedies provided which are denied to others. That there is a right to seek relief in a Federal court does not mean that the relief sought is necessarily available. More specifically, our question is whether Section 301, taken in context, requires or permits the enforcement of an executory covenant for the submission to arbitration of grievances pursuant to a collective bargaining agreement between a union and an employer.

The provisions of the contract between the parties to this appeal from which spring the problems presented are not novel, yet we do not find that the precise point presented has heretofore been considered by an appellate court. In the absence of statute it is the general rule that executory contracts to submit disputes to arbitration will not be specifically enforced. *Red Cross Line v. Atlantic Fruit Co.*, 1924, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. *Tejas Development Co. v. McGough Bros.*, 5th Cir. 1947, 165 F. 2d 276. Such is the rule as found by the framers of the Restatement of the Law. Restatement contracts, §550 (1932). The Supreme Court of Alabama, announcing the rule has said:

"The Courts are almost unanimous in declaring that equity will not decree specific performance of a contract to submit a cause to arbitration, while it will, in proper cases, entertain a bill to enforce an award." Ex parte Birmingham Fire Ins. Co. 1937, 223 Ala. 370, 172 So. 99.

If there be a right to specific performance of an arbitration provision in a collective bargaining agreement we must find it in an act of Congress. The Norris-LaGuardia Act, 29 U.S.C.A. §§101, et seq., does not preclude the granting of the relief sought. *Graham v. Brotherhood of Locomotive Firemen and Enginemen,* 1949, 338 U.S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The United States Arbitration Act expressly provides that nothing therein "contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C.A. §1.

In Section 2 it is said:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." July 30, 1947, c. 392, §1, 61 Stat. 669. 9 U.S.C.A. §2.

Section 3 of the Arbitration Act provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C.A. §3.

The Arbitration Act also provides that courts of the United States may direct arbitration in accordance with the terms of written agreements. 9 U.S.C.A. §4.

The Court of Appeals of the Third Circuit has had a number of occasions to consider the application of the Arbitration Act to collective bargaining agreements, and we cannot reconcile its views as expressed in its several opinions. It first held that the stay of proceedings provisions in Section 3 of the Act applied in a class suit for unpaid over-time compensation claimed under the Fair Labor Standards Act, 29 U.S.C.A. §§201 et seq. *Donahue v. Susquehanna Collieries Co.,* 3rd Cir. 1943, 138 F. 2d 3, 149 A.L.R. 271. Section 1 of the Arbitration Act, containing the exclusion clause was set forth in a footnote but was not mentioned in the opinion. The Donahue case, *supra,* was followed in *Watkins v. Hudson Coal Co.* 3rd Cir. 1945, 151 F. 2d 311 cert. den. 327 U.S. 777, 66 S. Ct. 522, 90 L. Ed. 1005, where it was said that the exclusion clause of Section 1 was not an over-all limitation. On a second appeal of the Donahue case a stay of proceedings was directed pursuant to Section 3 until arbitration was had. *Donahue v. Susquehanna Collieries Co.,* 3rd Cir. 1947, 160 F. 2d 661. The same result was reached in *Evans v. Hudson Coal Co.* 3rd Cir. 1948, 165 F. 2d 970. Before the next consideration of the question by the Third Circuit, Congress had reenacted the United States Arbitration Act and had included in the reenactment the following catch line of Section 1, " 'Maritime Transactions' and 'Commerce' Defined; Exceptions to Operation of Title". Act of July 30, 1947 (H.R. 2084), ch. 392, 61 Stat. 669. This, thought the court, in the next case before it, indicated a congressional intent that the exclusion in Section 1 applied to the entire Act, and it was held that collective bargaining agreements were "contracts of employment" within the meaning of the Act. *Amalgamated Ass'n, etc. v. Pennsylvania Greyhound Lines,* 3rd Cir. 1951, 192 F. 2d 310. This was followed in *Pennsylvania Greyhound Lines v. Amalgamated Ass'n,* 3rd Cir. 1951, 193 F. 2d 327.

In the most recent of the Third Circuit cases which we have noted, it was said by a divided court that a collective bargaining agreement between an employer producing goods for subsequent sale in interstate commerce, as is the employer in the case before us, and a union, is within the meaning of a contract in an "in-

dustry affecting commerce" as used in Section 301 of the Labor Management Relations Act of 1947, but that such a contract is not one of "employment of . . . workers engaged in foreign or interstate commerce" within the exclusion clause of Section 1 of the Arbitration Act. A majority of the court reconciled the decision with the prior holdings by saying that the two Pennsylvania Greyhound Lines cases involved employees engaged in interstate transportation, excluded by Section 1, and that the other earlier cases involved employees producing goods for subsequent resale in commerce, and not covered, said the court, by the exclusion clause. Two of the judges thought that collective bargaining agreements were not "contracts of employment" within the purview of Section 1 of the Arbitration Act, and were of the belief that the Pennsylvania Greyhound Lines cases should be expressly overruled. Two judges dissented. The court directed the granting of a stay pending arbitration. *Tenney v. United Electrical R. & M. Workers,* 3rd Cir. 1953, 207 F. 2d 450.

The Fourth Circuit departs from the Third Circuit and has held that the Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. Speaking for the Court and referring to Section 1 of the Arbitration Act, Chief Judge Parker has said:

> "Art. 1 of that Act of February 12, 1925, c. 213, as reenacted by the Act of July 30, 1947, c. 392, 9 U.S.C.A. §1, contains nothing but definitions of 'maritime transactions' and 'commerce' and an excepting clause; and we think it clear that the excepting clause was intended to apply to the entire act." *International Union v. Colonial Hardwood Floor Co.,* 4th Cir. 1948, 168 F. 2d 33.

The Colonial Hardwood case was followed in *United Electrical R. & M. Workers v. Miller Metal Products,* 4th Cir. 1954, 215 F. 2d 221.

It seems to us that the Sixth Circuit originally reached the same conclusion as had been pronounced in the Fourth. In a well reasoned opinion by Judge Hamilton wherein the first Donahue case, *supra,* is criticized, it is said:

> "The scope of the exception or proviso in the statute must be gathered from the view of the whole law, and if the

language of the exception is in perfect harmony with the general scope of the entire statute, the exclusion is applicable to the whole act. It is clear that the exception here in question was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged in interstate commerce. Section 2 of the Act makes valid and irrevocable all arbitration agreements in writing to submit to arbitration future controversies arising out of the contract of which the arbitration agreement was a part. It would be senseless to say that the exclusion from the Act covers the validity of the contract, but excludes the stay provision of Section 3. The reason for the exclusion is applicable to the entire Act. The language of the exclusion 'herein contained' is found in the first section of the Act. This section is made up entirely of definitions and exceptions to the operation of the title. 'Herein' as used in legal phraseology is a locative adverb and its meaning is to be determined by the context. It may refer to the section, the chapter or the entire enactment in which it is used. The fact that it was used in the present Act in a section where none of the substantive matter set up in the succeeding sections of the Act appeared must mean that it is to be applied to the whole Act and not to any given section. There can be no doubt that the contract in issue is a contract of employment. Appellant insists that the exception relates only to the subject specified in the title. If we give full weight to appellant's contention, its argument must fail because the title not only states that its purpose is to make valid arbitration contracts but also to make them enforceable. Section 3 sets up one of the methods of enforcement." *Gatliff Coal Co. v. Cox*, 6th Cir. 1944, 142 F. 2d 876.

But in a later case from the Sixth Circuit the court notes the conflicts. It adhered to its earlier view that the exclusion proviso of Section 1 of the United States Arbitration Act applies to the entire act, but it held that the collective bargaining agreement before it was a trade agreement and not a "contract of employment" within the exclusion clause. *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc.*, 6th Cir. 1954, 217 F. 2d 49.

As to the effect of the United States Arbitration Act in the case

before us, we align ourselves with the Fourth Circuit and hold that the collective bargaining agreement before us is a "contract of employment" within the meaning of the Arbitration Act and as such is excluded from the application of the act by its express terms. The earlier cases and their effect are commented upon in 17 Law and Contemporary Problems 580, and 65 Harv. L. Rev. 1238. Though the Norris-LaGuardia Act does not preclude, the United States Arbitration Act does not authorize the judicial enforcement of a contractual undertaking to submit to arbitration grievances arising under a collective bargaining agreement.

This brings us to the question of whether Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185(a), herein before quoted, provides for the enforcement of a provision for arbitration contained in a collective bargaining contract between an employer and a labor organization of employees engaged in producing goods for subsequent sales in interstate commerce. The Court of Appeals of the Tenth Circuit has given us, as dictum perhaps, a succinct answer to the query. It said:

> "This statute [29 U.S.C.A. §185(a)] is for the purpose only of giving jurisdiction to the federal courts in cases involving labor contracts. It does not give the federal courts any different or additional power than a state court would have if the action had been brought there". *Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO,* 10th Cir. 1951, 187 F. 2d 980.

In a decision from the Second Circuit it is stated:

> "But § 301 . . . created a remedy where none existed before and provided a forum in which to enforce it." *Shirley-Herman Co. v. International Hod Carriers, etc.,* 2d Cir. 1950, 182 F. 2d 806, 17 A.L.R. 2d 609.

In the Shirley-Herman case the remedy to which reference was made as being created by the statute was the right to sue a labor union as such and the right of unions to bring and maintain judicial actions. We think it unnecessary to consider other decisions of the Courts of Appeal or enter upon a review of District Court cases, of which there are a number. The answer to this phase of our inquiry is to be found, we think, in the opinions of the Supreme

Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 1955, 348 U.S. 437, 75 S. Ct. 488, 99 L. Ed. (Advance p. 368).

Perhaps it cannot fairly be said that the ratio decidendi of the Westinghouse case is more than that a Federal District Court does not have jurisdiction under Section 301 over an action brought by a union against an employer under a collective bargaining agreement on behalf of employees for wages which the employer refused to pay and which refusal the union asserted was in violation of the agreement. But in the several opinions we find a guide for our decision. Mr. Justice Frankfurter, with whose views Justices Burton and Minton concurred, found that if the "plain meaning" rule of construction could be applied, then all Section 301 does is to give procedural directions to the Federal courts to treat labor unions as natural or corporate persons in actions involving collective bargaining agreements, and to do so regardless of the amount in controversy and not to require diversity of citizenship. In considering the intent of Congress, Mr. Justice Frankfurter found that its aim was to open the Federal Courts to such suits solely because they were between the union and employers, but without providing any Federal law other than procedural for such suits. "It was evident", said Mr. Justice Frankfurter, "that the specific desire was to remove procedural obstacles, to suit by and against the union." He quoted Senator Taft, in proposing an amendment approximating §301, as saying:

> ". . . All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce and therefore involves a Federal question."

A question was raised by Mr. Justice Frankfurter as to whether the construction dictated by the "plain meaning rule" and by the intent of Congress could be placed within the constitutional restriction of Federal jurisdiction to cases arising under the Constitution and laws of the United States, etc. U.S. Const. Art. III, §2. It was necessary, thought Mr. Justice Frankfurter, to limit the scope of the Act as "doubtful legislation". The Court of Appeals, in its consideration of the Westinghouse case, had proceeded upon the so-

called "electric theory" that the collective bargaining agreement is not of itself a contract of hiring, that each employee makes with the employer a separate contract of hiring from which stems the obligation to pay wages, and that, while Section 301 creates "a federal substantive right", there is jurisdiction only of causes of action between a union and an employer. Since the Court of Appeals did not regard a breach of the obligation to pay wages as creating a cause of action in the union, it rejected Federal jurisdiction. *Association v. Westinghouse Electric Corp.* 3rd Cir. 1954, 210 F. 2d 623. Mr. Justice Frankfurter disagreed with the Court of Appeals, and indicated his view to be that no new federal law concepts of contractual interpretation were intended by the enactment of Section 301.

Mr. Chief Justice Warren, joined by Mr. Justice Clark, concurred and were of the opinion that it was enough to say that Section 301 was not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the right of an employee to receive wages; and being of such opinion they saw no reason to make labor policy or raise constitutional issues. Mr. Justice Reed also concurred in the result. He took the position that it was the intent of Congress to give federal jurisdiction over actions arising from breaches of collective bargaining agreements whether the rules of substantive law are derived from federal or state sources. He concluded, as did the Court of Appeals, that a breach of the duty to pay wages was a violation of an individual employment contract and not of the collective bargaining agreement.

In a dissenting opinion in the Westinghouse case, Mr. Justice Douglas, with whom Mr. Justice Black concurred, there was disagreement with the majority refusal to permit the Union to bring the suit. The minority did; however, concur in the view of Mr. Justice Reed that Congress "created federal sanctions for collective bargaining agreements, made cases and controversies concerning them justiciable questions for the federal courts, and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for the construction and interpretation of those collective bargaining agreements".

We have, in the case before us, a complaint by the Union that the Employer has breached a provision of a collective bargaining

agreement. Out of such complaint arise a case and controversy of which the Federal courts have jurisdiction under the Constitution as implemented by Section 301. And see 28 U.S.C.A. §1337. But it does not follow that because jurisdiction is given to Federal courts, there is a new federal law concept that authorizes the courts to enforce submission to arbitration. Before such a result is reached, we must find a rule of law derived from state or Federal sources. We do not think it matters whether a right to enforce submission to arbitration is or is not substantive, as was considered in *Bernhardt v. Polygraphic Company of America,* 2nd Cir. 1954, 218 F. 2d 948; or whether as said by Mr. Justice Brandeis, there is "the substantive right created by an agreement to submit disputes to arbitration", which he said "is recognized as a perfect obligation." *Red Cross Line v. Atlantic Fruit Co.,* 1924, 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582.

Finding nothing of Federal origin or in the laws of Alabama, of either common law or statutory enactment, or from any other source, that requires or permits, or from which we might, in the language of Mr. Justice Douglas, fashion a rule requiring or permitting, the enforcement of the covenant for arbitration of grievances, and concluding that Section 301 does not of itself provide or furnish the source for such a rule, we hold that there is no legal right to the relief sought.

In the determination of the case before us, it was held that, since the grievances arose while the collective bargaining agreement was in effect, the Employer was required to arbitrate such grievances subsequent to the termination date of the agreement. Although unwilling to adopt the most recent conclusions of the Third Circuit in construing the United States Arbitration Act, we are impressed by its views with respect to the effect of the termination of a collective bargaining agreement upon Section 301 procedure. After reciting the giving of notice of termination and the failure of negotiations toward a new contract between an employer and a union, the court said:

> "The old contract thereupon terminated pursuant to the permitted election already made manifest by timely notice as provided in the document itself. The obligation not to strike, like the other obligations of the contract ceased to exist. For this reason the complaint was properly dismissed". *Paterson*

*Parchment Paper Co. v. International Brotherhood,* 3rd Cir. 1951, 191 F. 2d 252.

Finding as we do that compliance with a covenant for arbitration in a collective bargaining agreement will not be compelled by a Federal court judgment where the courts of the state would deny such relief, it follows that there was no enforceable right which could have been either retained or lost upon the termination of the agreement. Hence we need not and do not decide whether such a covenant would survive where, under the applicable law, such a provision might have been enforced during the term of the agreement.

It is the view of this Court that the District Court erred in not sustaining the defendant's motion to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted. Therefore, with a direction to sustain the motion to dismiss, the judgment appealed from is

REVERSED.

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BROWN, Circuit Judge, dissenting:

The majority declares plainly that the District Court had jurisdiction. It does that on the basis of §301. With this I am in complete agreement. But applying the rationale of Mr. Justice Frankfurter's opinion as though it was all that was said by a court of eight, §301 is confined rigorously to the procedural concept. Finding neither state nor federal statute (apart from §301) authorizing injunctive enforcement of the agreement to arbitrate, the majority concludes that the court with power is yet powerless to proceed—it has power but no tools—in short, the door is opened but the hall is empty. I decline to believe that power is so sterile or that §301, if needed to bridge any gaps, exhausts itself by opening the door.

On jurisdiction I would spell out what seems implicit in the majority opinion: This is, on all tests, a *union* controversy in which the union is asserting in its collective capacity a demand relating to all of the employees as a group, on the one hand, and the employer, as such on the other. It is not the assertion, through name or guise of the union, of a single claim for one or the aggregation of many single claims for all arising under the individual contracts of employment, as such, between employee and employer. Ar-

bitration, as the last step in the grievance machinery, is in explicit terms the undertaking[1] of union and employer, and by its nature, its force and hence effectiveness, is derived from employer and union pledging that each will be bound. It is, we all agree,[2] therefore a case for §301.

What law was then to be applied? Side-stepping the engaging prospect of divining the mathematical probabilities of decision on this point amongst Justices splitting on a 3-2-1-2 combination, the court determines that under neither Alabama nor Federal law is there a right to enforce arbitration.

I am willing here to accept this cautious approach and assume that Alabama[3] will not specifically enforce an agreement to arbitrate and that the United States Arbitration Act, 9 U.S.C. 1, is not

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[1] Article VIII prescribes the steps. In Step 1 between Room Steward and department Overseer, Step 2 General Shop Committee and Mill Superintendent, the aggrieved employee may, "in his discretion" accompany the union representatives; but in Step 3 between the union and a representative of Employer's executive management and in Step 4 (adopting arbitration under IX(F)), it is strictly between union and employer.

Article IX(A) states: "The employer and the union agree that the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances * * *. It is the desire of the Union and the Employer to avoid strikes and work stoppages." Sub-paragraphs (B), (C), (D) and (E) contain a precise set of rules for the consequences of strikes, wildcat strikes, slowdowns, and other stoppages in disregard of the agreement to exhaust grievance machinery, including arbitration.

Sub-paragraph (E) makes it clear that both parties thought this was a §301 contract as the employer releases the union from liability for damages on the part of the union, its officers, agents or members "for breach of contract of any kind or character whatsoever" in consideration of the union's agreement to make the grievance machinery effectual.

[2] Our case International Molders etc. v. Western Foundry Company No. 15235 decided March 30, 1955 (remanded, per curiam, to dismiss for lack of jurisdiction), certiorari denied November 7, 1955, 24 Law Week 3126, applied *Westinghouse* to claim by union for wage increases due employees; Ferguson-Steere Motor Co. v. International Brotherhood etc., 5 Cir., 223 F. 2d 842, held that §301 could not be used to by-pass the National Labor Relations Board.

[3] Alabama may be reluctant as to remedy but not as to general validity. Alabama's constitution and statutes contain provisions indicating a public policy favorable to arbitration in general and spelling out in detail a system and procedure of arbitration. Code of Alabama, Constitution of 1901, Article 4 §84; Code of Alabama Title 7 §829 (formerly 2908) thru §844 (formerly 2923). §844 states that the statute is cumulative rather than restrictive, but §829, 830, and 831 may indicate that the statute and public policy are limited to agreements to arbitrate specific disputes already arisen and do not comprehend agreements for arbitration of future disputes. See Headley v. Aetna Insurance Co., 202 Ala. 384, 80 So. 466, 467; Ex parte Birmingham Fire Insurance Co. (Sup. Ct. Ala.) 172 So. 99, 101; Caldwell v. Caldwell, 157 Ala. 119, 47 So. 268, 269.

available[4] or effective to supply the federal statutory mechanics for arbitration.

But the studied search for a federal statute, the painstaking analysis of the cases under it, demonstrates, I think, a misconception of the fundamentals. It is as though we were dealing with a court having statutory power only. But that is not the case. The United States District Court is a constitutional organ with the intrinsic capacity to grant traditional coercive relief as the cause over which it has jurisdiction may require. *Williamson v. Berry,* 8 How. 495, 536, 12 L. Ed. 1170, 1187, "Jurisdiction in chancery is inherent and original, comprehending now almost every exigency of human disagreement, for which there is not an adequate remedy at law."

Judge Goodrich in the recent opinion in *Johnson, Warden v. Marsh,* No. 11713 (November 30, 1955) . . . F. 2d . . . not yet reported, finding ample inherent power to grant bail even though no statute can be found described both this full power to act once the court acquires jurisdiction [here by virtue of §301] and the basic misconception that the district court can do only that which some statute permits:

> "The statement is often made that the inferior courts of the United States are courts of limited jurisdiction. This is a truism in one sense. These courts are competent to act in such cases, and only in such cases, as the Congress, pursuant to the Constitution, assigns to them. And unless constitutional provisions stand in the way, the assignment may be varied at the will of Congress. But within the area of activity assigned to them, Federal courts are courts of full stature, and we may rightly look to common law concepts and precedents to see the scope of the implied or 'inherent' authority which the judicial office carries with it. * * * We believe that the basic misconception in those decisions denying

[4] See, The Federal Enforcement of Labor Arbitration Agreements, Seymour Phillip Kaye, New York University Sixth Annual Conference on Labor, 1953, p. 207, a detailed discussion of this problem and legislative history of the Arbitration Act; Legal Aspects of Labor Arbitration, Lee Epstein, New York University Second Annual Conference on Labor, 1949, p. 383 at 388; Labor Arbitration—The Arbitrable Issue, Ralph E. Kharas, Fifth Annual Conference on Labor, 1952, pp. 633, 637, 638; Legal Status of Labor Arbitration, Jesse Freidin, New York University First Annual Conference on Labor Law, 1948, 233, 247, 251.

this authority lies in their view that since Federal courts have limited, statutory jurisdiction, their powers in proceedings involving this jurisdiction are necessarily limited and must be statutory. See Principle v. Ault, 62 F. Supp. 279, 282 (N.D. Ohio 1945). This, as already indicated, is not our view of the matter."

The remedy sought here is common and traditional—the equity injunction to compel or restrain action because of the inadequacy of the usual money damage. Its availability need find no source, as such, in specific statute. Indeed, it has been the frequent instrument of effectual sanction for enforcement of the policy of statutes.[5] Since power is present and a traditional tool is available and effective, is there an obstacle to their full use? There is clearly no statutory[6] proscription, and an accurate treatment of

[5] The equity injunction has been a potent weapon to effectuate declared policy in the field of labor relations against severe attacks that the statute reflecting such policy [here it would be the Taft-Hartley Act] was silent on such sanction: Texas & New Orleans Railroad Company v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548; 74 L.Ed. 1034; Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 551, 81 L.Ed. 789, 801, "In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace." Steele v. L. & N. Railroad Co., 323 U.S. 192, 89 L.Ed. 173; Tunstal v. Brotherhood of L.F&E., 323 U.S. 210, 89 L.Ed. 187; Graham v. Brotherhood of L.F.&E., 338 U.S. 232, 94 L.Ed. 22; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 96 L.Ed. 1283.

See for other statutes: United States v. F. O. Morgan, 307 U.S. 183, 194, 83 L.Ed. 1211, 1218, 1219; Porter v. Warner Holding Company, 328 U.S. 395, 398, 90 L.Ed. 1332, 1336, 1337; Hecht Co. v. Bowles, 321 U.S. 321, 329, 331, 88 L.Ed. 754, 760, 761; Federal Power Commissioner v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 500, 93 L.Ed. 1499, 1502; Federal equity court grants or withholds its injunction to effectuate public policy, Hurd v. Hodge, 334 U.S. 24, 34, 35, 92 L.Ed. 1187, 1195.

This power to use a traditional federal equity remedy is so pervasive as to be available in diversity actions where, in a comparable situation, the local state court would not, or could not, grant equitable relief: see Guaranty Trust Co. v. York, 326 U.S. 99, 106, 89 L.Ed. 2079, 2084, 2085.

Federal equity court has great flexibility in molding relief in cases over which it has jurisdiction with all powers of the Court of Chancery: Sprague v. Ticonic National Bank, 307 U.S. 161, 164, 165, 167, 83 L.Ed. 1184, 1186, 1187; Barber v. Barber, 21 How. 582, 592, 16 L.Ed. 226, 229; it could hardly have this wide capacity were it required to find statutory basis for the remedy, its availability or use.

See also following which affirm an inherent power in a Federal Court to act: Wright v. Henkel, 190 U.S. 40, 63, 47 L.Ed. 948, 956; United States v. Hudson and Goodwin, 7 Cranch 32, 34, 11 U.S. 21, 23, 3 L.Ed. 259, 260; United States v. Shipp, 203 U.S. 563, 572, 573, 51 L.Ed. 319, 323.

[6] We are in accord that Norris-LaGuardia Act, 29 U.S.C. 101, does not

historical precedent reveals no self-generated decisional policy against its use. Despite the flood of words that ordinarily executory contracts to arbitrate will not be specifically enforced, this reflects no federal policy of hostility to arbitration as such. On the contrary, arbitration is given enthusiastic federal sanction[7] and where a general Congressional policy is plainly indicated that such a mechanism will be useful in effecting its legislative aim, equity has the power, and the right, in the public interest, to make arbitration effective.[8]

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forbid relief here. See also Textile Workers Union v. American Thread Co., D.C. Mass., 113 Fed. Supp. 137; Local 207 v. Landers, D.C. Conn., 119 Fed. Supp. 877; Milk and Ice Cream Drivers v. Gillespie Milk Products Corp., 6 Cir., 203 F. 2d 650; Textile Union of America v. Aleo Mfg. Co., D.C.N.C., 94 Fed. Supp. 626; United Textile Workers v. Goodall Sanford, D.C.Me., 131 Fed. Supp. 767. Contra: Mead v. International Brotherhood, 1 Cir., 217 F. 2d 6.

[7] The federal approach has not been that of many jurisdictions which, with jealous eye, scanned all such devices lest they infringe upon or oust the courts from their historic role. Judge Hough, in United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd., S.D.N.Y., 222 Fed. 1006, 1007, characterized it: "* * * A more unworthy genesis cannot be imagined." See Mr. Justice Story's comments from Tobey v. Bristol County, Fed. case No. 14065 quoted footnote 1 Red Cross Line v. Atlantic Fruit Co. 264 U.S. 109, 120, 68 L.Ed. 582, 585, and Mr. Justice Brandeis continued: "But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. Hamilton v. Home Ins. Co., 137 U.S. 370, 385, 386, 34 L.Ed. 708, 713 * * *. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity. Karthaus v. Yallas Y. Ferrer, 1 Pet. 222, 7 L.Ed. 121; Burchell v. Marsh, 17 How. 344, 15 L.Ed. 96; Bayne v. Morris, 1 Wall. 97, 17 L. Ed. 495. And, although there is no federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. Hecker v. Fowler, 2 Wall. 123, 17 L.Ed. 759."

The court in Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 277, 76 L.Ed. 282, 290, sustaining the United States Arbitration Statute characterized compulsion of arbitration as "one of remedy only."

[8] Virginia Railway Co. v. System Federation No. 40, supra, at 552, "* * * The peaceable settlement of labor controversies, * * * is a matter of public concern. * * * Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved * * *. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, Tobey v. Bristol County (C.C.) 3 Story, 800, Fed. Cas. No. 14,065, supra, enforce statutes commanding performance of arbitration agreements. Red Cross Line v. Atlantic Fruit Co. * * *; Maritime Transit Co. v. Dreyfus * * *."

Clearly, arbitration is a welcome device to Congress. Indeed, the Arbitration Act itself, 9 U.S.C. 1, reflects a determination that the needs of the business and industrial world would be aided by giving procedural certainty and greater vitality to the use of voluntary non-court means of settling disputes. The express exclusion of "contracts of employment" is no left-handed, reverse reinstatement of the ancient attitude of hostility—"contrary to public policy." Rather, the difficulties encountered by the Third, Fourth and Sixth Circuits in attempting to adapt that statute to the field of labor problems covered so long by special legislation bespeaks, perhaps, a Congressional prescience.

But Congress has been much more direct in its blessing. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, is a detailed framework of voluntary conciliation and mediation with arbitration awards being final, binding and legally enforceable.[9] This same scheme is duplicated for airline carriers, 45 U.S.C. 181, *et seq.* Moreover, the Labor Management Relations Act of 1947 contains the positive declaration that it is the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation * * * can most satisfactorily be secured * * *" by settlement of issues between employers and employees by conciliation, mediation, and voluntary arbitration. This is stated, not alone in categorical terms, 29 U.S.C. 171 through 178, but the public interest is so direct that the statute establishes the Federal Mediation and Conciliation Service, an independent agency, as an arm of the Government operating at public expense.[10]

In every modern piece of labor legislation, the Congress has

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[9] The Adjustment Boards, §153, are in reality bipartisan arbitrations whose awards are final, 153 First (m) and enforceable within two years by court petition (p) (q); §157 provides for arbitration of disputes not settled by mediation or Board of Adjustment under §§151-156, and under §158 (1) awards are binding, are filed (k) in the Federal District Court where, under §159 the award is conclusive and on which the court shall enter judgment unless set aside for one of three limited, specific grounds.

[10] Governmental assistance through the Mediation Service is specifically directed to settlement of differences by mutual agreement through conference, collective bargaining, "or by such methods as may be provided for in any applicable agreement for the settlement of disputes" (§171); this is spelled out further in 173 (d), "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and

either directed the establishment of arbitration systems or has recognized the essential desirability of their existence with the full force of the Government, its prestige, and its treasury behind them as an essential device for maintenance of industrial peace. In such an atmosphere it contradicts all that Congress has done to resurrect the bones of an ancient day to find some supervening notion that arbitration agreements, while tolerated to the point of acceptance once completed, are inherently evil and beneath the claim of right which the Chancellor will affirmatively protect.

The power exists over parties and cause by §301. The remedy sought is traditional, common and effective. There is no policy against its use and there is overwhelming evidence of a Congressional purpose to encourage, facilitate and make effectual all of the collective processes of bargaining, conciliation, mediation and arbitration. On this approach it is the use of the federal power, a federal remedy to effectuate a federal policy. There is no need to draw upon state jurisprudence with the constitutional uncertainties involved.

Moreover, this gives a cohesive consistency to the total federal labor picture. Federal constitutional power is amply present under this very Labor Management Relations Act to require employer and employees to bargain in good faith on the inclusion[11] of an agreement to arbitrate in the bargaining contract and to is-

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mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

See, Legal aspects of Labor Arbitration, Epstein at p. 389, cited footnote 4 *supra;*

Forkosch, Treatise on Labor Law, 1953, 476-488, in a detailed analysis suggests that the policy on arbitration is so strong that it might even be compulsory, at least in satisfying the conditions precedent to a Norris-LaGuardia injunction. This is certainly the plain holding of Brotherhood of Railway Trainmen v. Toledo, Peoria, and Western Railroad, 321 U.S. 50, 88 L.Ed. 534, and its rejection of the holding of this Court, Mayo v. Dean, 5 Cir., 82 F. 2d 554 (see Supreme Court discussion at 321 U.S. 61, 88 L.Ed. 541). The words of §108 (29 U.S.C.A. 108) are categorical that it is the policy of Congress that, "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or *voluntary arbitration*" shall be made. Inscribed so plainly and announced for such a length of time (since 1932), it seems unlikely to think that Congress must spell it out again.

See United Office and Professional Workers of America v. Monumental Life Ins. Co., E.D.Pa., 88 Fed.Supp. 602, 607.

[11] 29 U.S.C. 158 (a)(5). In NLRB v. Corsicana Cotton Mills, 5 Cir., 179 F. 2d 234, 235, a contempt proceeding for violation of cease and desist order, we exerted a supervisory administration of the collective bargaining

sue necessary coercive orders to effectuate it, to protect parties from charges of unfair labor practice[12] and deny reinstatement[13] to displace strikers where the strike is a breach of the agreement to arbitrate.

Arbitration is now the usual, almost universal mechanism to assure industrial peace during the life of the contract. Unlike its frequent use in commercial fields as a substitute for the costly delays and uncertainties of court litigation, the device is adopted in labor relations as a substitute for the economic pressures each can marshal in the strike or lockout, or the threat of either.[14] It

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process, one of the points in controversy being the arbitration clause. See NLRB v. American National Insurance Co., 343 U.S. 395, 407, 408, 96 L.Ed. 1027, 1038, 1039, requiring, but finding, good faith negotiation on the issue of a "management functions clause" versus "unlimited arbitration clause."

12 See Timken Roller Bearing Co. v. NLRB, 6 Cir., 161 F. 2d 949. Without invoking grievance machinery including arbitration for layoff of ten employees, union struck, employer refused further to entertain grievances and Board found employer guilty of unfair labor practice for failure to bargain; the court reverses holding that to require compliance with the contract including the agreement to submit to arbitration is the essence of collective bargaining in good faith; likewise, it held the union strike over a demand against subcontracting unlawful since the question whether subcontracting was or was not within the "management functions clause" was itself an arbitratable issue.

See also NLRB v. Standard Oil Co., 6 Cir., 196 F. 2d 892.

13 W. L. Mead, Inc., 113 LRB 109, 5 CCH Labor Law Reports (4th Edition), par. 53162, Labor Law Journal, October 1955, Vol. 6 No. 10, p. 721; 20 employees walked off the job, established a picket line to enforce demands concerning definition of duties and working hours of a truck driver after employer requested arbitration pursuant to arbitration clause in bargaining agreement. General Counsel brought complaint for refusal to rehire; Board reversed Trial Examiner and held employer could lawfully discharge the strikers. The Board stated: "* * * There can be no question but that in the case before us the grievance and arbitration clause * * * is a material provision of that agreement * * *. We find that [the contract] * * * excluded any other means but arbitration for the resolution of disputes, particularly unilateral action by any party * * *.

"Every encouragement should be given to the making and enforcement of such clauses. * * * To hold that a strike in furtherance of such a material breach of a clear and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Court of Appeals and the Supreme Court."

14 As perhaps unique proof of its unpartisanship arbitration has the rare distinction of being praised and feared by management and labor alike. Peter Seitz, a management representative, in The Enforcement of Collective Bargaining Contracts By Arbitration, New York University Sixth Annual Conference on Labor, 1953, p. 15, describes it: "The first fact to note is that arbitration is what I call a 'glandular' word. By that I mean that the mere articulation of the word causes thyroid and adrenal glands to secrete. Men-

would be incongruous indeed to find difficulty or even doubt, that a sovereign which can constitutionally compel the parties seriously in good faith to negotiate for an agreement to arbitrate, and punish and coerce them into compliance with it by administrative orders, sanctions or the denial of them with the added prestige of court approval by appellate review, will lack the power when its constitutional court is asked to grant a traditional remedy which will have the same end.

If I am mistaken that the network of federal labor legislation is the culture in which the Congressional policy of encouraging effective enforcement of arbitration can grow into a basis for an equity court granting an injunction, I would nonetheless reach the same result by using, for the first time, §301 in a modified sub-

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tion the term and calm men get bloodshot eyes; pulses throb and temperatures rise. This is specially interesting because the identical, violent, physical and emotional reactions will be observed in both management and labor representatives * * * [the] attitude toward arbitration is not unlike that of George Wither, the Restoration poet, who impatient with the conspicuous lack of affection demonstrated by his lady-love proclaimed:

"'If she be not so to me,
What care I how fair she be?'"

The widespread use commenced during the war days under the National War Labor Board and was stimulated later by the President's National Labor-Management Conference of 1945 attended by delegates representing AFL, CIO, Mine Workers, Railway Brotherhoods, United States Chamber of Commerce, National Association of Manufacturers which recommended final determination of grievances involving the interpretation or application of the collective bargaining agreement by an impartial chairman, arbitrator, or board, the decision of which should be final and binding on both, with specific machinery agreed to on the selection of the arbitrator (the agreement in this case tracks it closely). U. S. Department of Labor, Division of Labor Standards Bulletin No. 77, pp. 42 43, 1946. A study made by the Bureau of National Affairs, Inc., 1950, indicated that at least 80% of the collective bargaining agreements in the nation's important industries provided for arbitration as the terminal point of the grievance machinery. See, How Arbitration Works, Elkouric, 1952, The Bureau of National Affairs, Inc., pp. 6-10; Arbitration and Arbitration Provisions, J. Noble Braden, Tribunal Vice-President, American Arbitration Association, New York University Second Annual Conference on Labor, 1949, 355, 365. There has been a steady growth in percentage of agreements to arbitrate, from 73% in 1944 to 83% in 1949, Arbitration Provisions in Union Agreements in 1949, James Nix, Monthly Labor Review, February 1950, pp. 160-165, to approximately 91% in 1942, Arbitration Provisions in Collective Agreements, 1952, Ernestene M. Moore and James Nix, Monthly Labor Review, U. S. Department of Labor, Bureau of Labor Statistics, March 1953, pp. 261-266. The value of arbitration in the workaday handling of labor relations is attested by the practice of making formal, written arbitration reports which are indexed, digested and reported. See, Labor Arbitration Reports, The Bureau of National Affairs, Inc., approximately 21 volumes published.

stantive way. I do this since I believe that §301 is much more than a mere photoelectric cell to open wide the door as union-employer, *vis-a-vis*, approach. When a genuine *union* controversy, i.e., a 301 suit comes before it, the combinations of dissenting and concurring opinions in *Westinghouse* will, I believe, restore sufficient vitality to §301 to enable it to reflect federal policy itself and reach out comfortably, as the occasion may require, into state and federal concepts to fashion the controlling law. Whether this will be the creation of new federal rights or merely the release of its nascent powers, this reading of §301 would say to the district court that if there has been a breach of the collective bargaining agreement it shall exert whatever of its traditional weapons—the money judgment, the declaratory pronouncement, or the equity injunction —which will best assure contractual compliance.

Difficulties in forging a responsive jurisprudence neither indicate nor foretell a constitutional void, and it seems surprising at this late date that our flexible judicial apparatus, because of the likelihood of conflict with local law, should shrink from the necessity. The federal system has so well demonstrated its fluid capacity[15] that, applying its rule, doctrines frequently ignore, often reject, and frequently collide with local (state) principles[16] and, where

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[15] The federal courts have fashioned suitable federal principles in countless situations to effectuate multiple federal policies: Tort rules under Federal Employers Liability Act, Jesionowski v. Boston & M. R. R., 329 U.S. 452, 91 L.Ed. 416, Central Vermont Ry. Co. v. White, 238 U.S. 507, 59 L.Ed. 1433; The Jones Act, 46 U.S.C. 688, Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 83 L.Ed. 265; Laches in the enforcement of federal rights, Holmberg v. Armbrecht, 327 U.S. 392, 90 L.Ed. 743; Government contracts, Priebe & Sons v. United States, 332 U.S. 407, 92 L.Ed. 32, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 92 L.Ed. 10; Federal negotiable instruments and bonds, Clearfield Trust Co. v. United States, 318 U.S. 363, 87 L.Ed. 838, National Metropolitan Bank v. United States, 323 U.S. 454, 89 L.Ed. 383, Continental American Bank & Trust Co. v. United States, 5 Cir., 161 F 2d 935, D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 86 L.Ed. 956; Problems incident to National Banking System, Deitrick v. Greaney, 309 U.S. 190, 84 L.Ed. 694; Liabilities in performance interstate transportation contracts, O'Brien v. Western Union Telegraph Co., 1 Cir., 113 F. 2d 539; and see Moore's Commentary on the United States Judicial Code, 1949, pp. 340-359, revealing, in detail, the development of a full body of law adequate to give life to federal policy.

[16] Spectacular illustrations are found in the field of federal taxation: Burnet v. Harmel, 287 U.S. 103, 77 L.Ed. 199, property status oil lease under local (Texas) law rejected; Burk—Waggner Oil Association v. Hopkins, 269 U.S. 110, 111, 114, 70 L.Ed. 183, 185, state law disregarded in determining

needed to effectuate Congressional will, the conflict and collision[17] may occur between two federal statutes or policies.

The agreement to arbitrate, for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which §301 sought to answer. If it is not available here, then nought[18] is left of §301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used.

The injunctive order to compel arbitration was right and should be affirmed.

I therefore respectfully dissent.

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status of group as partnership or corporation for income tax purposes; Lyeth v. Hoey, 305 U.S. 188, 83 L.Ed. 117, nature of interest under inheritance.

Similarly, state standards on existence of independent contractor relationship and the common law concept of direction and control, are frequently rejected: Rutherford Food Corp. v. McComb, 331 U.S. 722, United States v. Silk, 331 U.S. 704, Harrison v. Greyvan Lines, 331 U.S. 704, 715, 719; NLRB v. Hearst, 322 U.S. 111, 124-133.

[17] The same situation or circumstance frequently produces diverse results: e.g., direction and control of trucks, adequate to create genuine independent contractor relationship under Wage & Hour Law, and Social Security Law, United States v. Silk 331 U.S. 704, Harrison v. Greyvan Lines, 331 U.S. 704, is insufficient to make physical performance by owner-drivers of trucks "transportation" under National Transportation Act, 49 U.S.C. 301, United States v. Rosenblum Truck Lines, 315 U.S. 50, 86 L.Ed. 671 Thomson v. United States, 321 U.S. 19, 88 L.Ed. 513; a crew member of a non-self-propelled dredge is a "seaman" under the Jones Act, 46 U.S.C. 688, McKie v. Diamond Marine Co., 5 Cir., 204 F. 2d 132, but not a "seaman" under the Wage & Hour Act, Walling v. W. D. Haden Co., 5 Cir., 153 F. 2d 196, Cert. Den. 328 U.S. 866, 90 L.Ed. 1636; Towing of barges physically performed by chartered tug is not "transportation" by tug owner-operator under the Interstate Commerce Act, 49 U.S.C. 901, 909 (a), De Bardeleben Coal Corp. v. United States, W.D.Pa., 54 Fed.Supp. 643, affirming Union Barge Line Application, 250 I.C.C. 689, but is "transportation" for transportation tax under 26 U.S.C. 3475 (a), Gulf Coast Towing Co. v. United States, 5 Cir., 196 F. 2d 944.

[18] The court's action in International Ladies' Garment Workers, etc. v. Jay-Ann Co. No. 15,636, with this one, chipping away from §301, adds only to the uncertainty. The court finds no jurisdiction to enforce the agreement to make payments by employer to the union's welfare fund. I would disagree with it as well. That, too, seems to me to be a genuine *union* controversy, and finding no jurisdiction it is actually in conflict with the majority here.

# APPENDIX C

United States Court of Appeals
For the First Circuit

No. 4980.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
Plaintiff, Appellant,

*v.*

GENERAL ELECTRIC COMPANY,
(Telechron Department, Ashland, Massachusetts),
Defendant, Appellee.

Appeal from the United States District Court
for the District of Massachusetts.
[129 F. Supp. 665.]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

## OPINION OF THE COURT

April 25, 1956.

MAGRUDER, *Chief Judge*. This case, together with two others also decided today, presents the question of whether a federal district court has authority, under §301 of the Labor Management Relations Act of 1947 (61 Stat. 156), to compel an employer to arbitrate a dispute in accordance with the terms of a collective bargaining agreement between such "employer and a labor organization representing employees in an industry affecting commerce."

Plaintiff-appellant is an unincorporated labor organization representing employees of defendant Company at a plant in Ashland, Mass., which is, without dispute, in an industry affecting commerce, within the meaning of the Act. Article XII of the collective bargaining agreement in effect between the parties at the relevant dates established a conventional four-step procedure for adjustment of employee grievances between the Union and the

Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached. Article XIII provided:

> "1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishing of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company . . ."

The Article required written notice of intention to submit an unresolved grievance to arbitration within 30 days after the decision rendered in step 4 of the grievance procedure, and it went on to describe certain procedural matters and restrictions on the scope of the arbitrator's authority. He was limited, in so far as relevant here, to "interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract . .m, or in any way alter the provisions of this Agreement."

Two grievances filed by the Union in 1954 are the subject of its present suit. One involved a dispute over whether an employee named Boiardi was employed in a certain job classification carrying a higher rate of pay than he in fact was receiving; the other involved the propriety of the discharge of an employee named Armstrong for refusing to clean certain machines when he asserted that such work was in addition to his regular duties. After unsuccessfully prosecuting these matters through the procedure of Art. XII, the Union duly notified the Company in each case of its desire to arbitrate, but the Company refused to submit to arbitration either the merits of the two grievances or the disputed issue of whether they were arbitrable under the provisions of Art. XIII first quoted above. The Union then filed its complaint in the district court, alleging jurisdiction under §301. It sought as to each of the grievance cases an order "that defendant be required specifically to perform its agreement to arbitrate" and damages. After the district court granted a motion to strike the claims for equitable relief, the amended complaint was again amended to eliminate the damage claims. This was done so that no question could be raised as to the appealability of the decision. Plaintiff's appeal is properly here, under 28 U.S.C. §1291, from the final order of

April 27, 1955, which dismissed the complaint for want of jurisdiction, the district judge being of the view that he was forbidden by the Norris-LaGuardia Act (47 Stat. 70) from issuing the requested order to compel arbitration of the two disputes. See 129 F. Supp. 665.

I

In any case where equitable relief in some form is sought in the context of a controversy involving labor relations, a federal court must inquire whether the Norris-LaGuardia Act has withdrawn the jurisdiction of the district court to grant the desired remedy. See *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters,* 217 F. 2d 6 (1954), in which case we affirmed an order denying a temporary injunction against a strike and picketing alleged to be in breach of a collective bargaining agreement. We held that §301 had not repealed by implication the withdrawal of jurisdiction to enjoin the activities listed in §4 of the Norris-LaGuardia Act even in a case where such activities constitute a breach of contract. The present case presents a different problem, for the activity against which relief is sought, refusal to arbitrate, can in no way be fitted into any of the classes enumerated in §4. However, consideration must also be given to §7 of the Norris-LaGuardia Act, the relevant parts of which are set forth in the footnote.* See also §§8 and 9. If it is not implicit

* "Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been

in our discussion in the *Mead* case, *supra*, we now affirm that our determination there that enactment of §301 did not by implication repeal §4 of the Norris-LaGuardia Act applies as well to §7 and indeed to the whole of that Act. It is in this light that one must read the dictum in the *Mead* opinion (217 F. 2d at 9) that "equitable relief may sometimes be given in terms which do not trench upon the interdictions of §4 of the Norris-LaGuardia Act." That is, any such equitable relief to be given in a suit brought under §301 must also not "trench upon the interdictions of" §7, when that section and the Act of which it is a part are applicable according to their own terms.

In recognition of this situation, it has sometimes been argued that a suit to remedy a breach of contract does not involve or grow out of a "labor dispute." This argument cannot be accepted, in the face of the sweeping definitions of §13, which set the scope of the Norris-LaGuardia Act. (47 Stat. 73) Any controversy between an employer and a union "concerning terms or conditions of employment" is included, "and no less so because the dispute is one that may be resolved or determined on its merits by reference to the terms of a collective bargaining agreement." *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, supra, 217 F. 2d at 8, and cases cited; see Note, 37 Va. L. Rev. 739, 746 (1951).

Nevertheless, it is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. Although

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given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court . . ." (47 Stat. 71-72).

the present controversy is a "labor dispute" within the scope of the Act as defined in §13, the relief sought is not the "temporary or permanent injunction" against whose issuance the formidable barriers of §7 are raised. Of course, the label used to describe the judicial command is not controlling. We would not rest by saying that an order to arbitrate is a "decree for specific performance" in contradistinction to a "mandatory injunction," for each term has been attached so frequently to this type of relief that neither can be rejected out of hand as an inappropriate characterization of it. But see 2 Pomeroy, Equitable Remedies §2057 (2d ed. 1919). For reasons to be developed below, we believe that the "injunction" at which §7 was aimed is the traditional "labor injunction," typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute. *E.g., Alcoa Steamship Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D.N.Y. 1948), aff'd 173 F. 2d 567 (C.A. 2d, 1949); *Associated Telephone Co. Ltd.* v. *Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953). An order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration, seems to have a different character, whatever name is given to it. Cf. *Sanford* v. *Boston Edison Co.*, 316 Mass. 631 (1944); *Lincoln Mills* v. *Textile Workers Union*, 230 F. 2d 81 (C.A. 5th, 1956) (arbitration order denied on other grounds).

It should be noted in passing that the Supreme Court has recently reaffirmed its ruling that an order denying a stay of an action for damages in favor of arbitration is "refusal of an 'injunction' under" 28 U.S.C. §1292. *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 (1955). Whether the same characterization would be applied to an order affirmatively compelling arbitration need not be decided, for the *Baltimore Contractors* case and its predecessors were treating the stay order as an "injunction" only for the purpose of determining appealability under 28 U.S.C. §1292(1), as is obvious from the opinions. What is an "injunction" for that statutory test would seem to have little relevance to what is an "injunction" in the wholly different context of the Norris-LaGuardia Act. Cf. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 452 (1935). See also

*Goodall-Sanford, Inc.* v. *United Textile Workers,* No. 5029, decided today.

It is significant, while still at the verbal level, that within the Norris-LaGuardia Act itself a distinction is made in the breadth of the bars imposed on equitable relief. The sections that might be relevant here all deny jurisdiction to issue an "injunction" (§§4, 5, 7, 9, 10) or "injunctive relief" (§8). In contrast is §3, where the so-called "yellow dog contract" is declared to be not enforceable in the federal courts by "the granting of legal or equitable relief." Congress might have more broadly withdrawn all "equitable relief" in §7, and its use instead of the phrase "temporary or permanent injunction," in view of the clear desire for stringency in this Act, suggests that a narrower intent was deliberate.

More significant is the fact that the Norris-LaGuardia Act has been interpreted as not even withdrawing all "injunctive relief." *Virginia Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U.S. 232 (1949). Those cases might once have been explainable as resting upon special factors in the terms or history of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*), but the Supreme Court has quite recently extended the power to enjoin racial discrimination exercised in the *Graham* case to the case of a union subject to the National Labor Relations Act, apparently considering the possible differences between the two Acts as not worthy of comment. *Syres* v. *Oil Workers Union,* 350 U.S. 892 (1955).

Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of §7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also §9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and

picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom; if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended §7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts.

Congress had no hostility to arbitration as such, as is demonstrated by §8 of the Norris-LaGuardia Act, which denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation or voluntary arbitration." See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944). Indeed, the general purpose of the Act to encourage the development of free collective bargaining, while it should not be taken broadly as an argument for an interpretation excluding from the coverage of the Act all decrees for specific performance of contracts, may properly be invoked as additional support for our conclusion with respect to specific performance of the promise to arbitrate, as was done in *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954), appeal dismissed 224 F. 2d 176 (C.A. 2d, 1955) and *Local 207* v. *Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954). See also *Virginian Ry. Co.* v. *System Federation No. 40*, supra, 300 U.S. at 563; Comment, 21 U. Chi. L. Rev. 251, 258-61 (1954).

Many of the cases dealing with demands for equitable enforcement of collective bargaining agreements have simplified the problem of the Norris-LaGuardia Act by use of what was deemed to be the appropriate label—"injunction," to deny relief, or "specific performance," to grant it—and they have tended not to distinguish between different types of equitable remedies in this regard. Therefore, we have not been persuaded by such cases denying relief as *Associated Telephone Co. Ltd.* v. *Communication Workers*, supra; *International Longshoremen's Union* v. *Libby, McNeill & Libby*, 114 F. Supp. 249, 115 F. Supp. 123 (D. Hawaii 1953), aff'd on other grounds 221 F. 2d 225 (C.A. 9th, 1955). Nor does our conclusion rest on similar decisions granting relief, such as *Textile*

*Workers Union* v. *Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950); *Milk Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (C.A. 6th, 1953).

Other cases, correct on their own facts, have often been cited, erroneously we think, as authority for denying equitable relief in all circumstances. *E.g., Alcoa Steamship Co., Inc.* v. *McMahon*, supra (§4 activity, as in the *Mead* case); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4th, 1948) (unfair labor practice). In addition, there are cases which are frequently cited in support of the grant of an equitable remedy, although they seem only to have assumed that some equitable relief could be given, without mentioning the Norris-LaGuardia Act. See *AFL* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (C.A. 6th, 1950); *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, 534 (C.A. 4th, 1951). Also silent on the effect of the Norris-LaGuardia Act were some of the cases dealing with the United States Arbitration Act (9 U.S.C. §§1 *et seq.*), which will be discussed below.

Thus we do not consider that our answer to the Norris-LaGuardia problem was either foreclosed or required by prior authority. It is supported directly by a few cases, one of which, although citing opinions on which we do not rely, aptly summed up the analysis made above: "The general structure, detailed provisions, declared purposes, and legislative history of that statute [Norris-LaGuardia] show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co.* 113 F. Supp. 137, 142 (D. Mass. 1953); cf. *Local 207* v. *Landers, Frary & Clark*, supra, 119 F. Supp. at 879; *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 165-66.

One final objection to our ruling should be discussed. It has been argued in these cases that no arbitration order could be given against a union under the Norris-LaGuardia Act, and therefore that the concept of mutuality of remedy requires that the same order against the employer be denied. The reply is two-fold. Our ruling herein, that an order to compel arbitration is neither barred specifically by §4 nor subject to the requirements of §7, means that such an order could be granted against either party to a labor

dispute without violating the Act. The same is true of an order to stay a lawsuit in favor of arbitration. If the union's breach of an arbitration promise should take the form of a strike, however, our prior holding in the *Mead* case applies, so that the order to arbitrate could not be accompanied by an injunction against the strike. Continuation of the strike theoretically is not a barrier to an arbitration, although practically it may be, in some cases, either because the employer deems it unfair to arbitrate in the face of a strike or because an arbitrator will not sit in those circumstances. See Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 603-06 (1954). But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy. See *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, supra, 321 U.S. at 62-63; *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, C.A. 1st, March 6, 1956. In the second place, although the Norris-LaGuardia Act is not a "one-way street" (see S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932)), it certainly was intended and has application mainly as a protection for union and employee activities. Where its terms can be read to include employer conduct, that conduct should also be protected. See Wollett and Wellington, "Federalism and Breach of the Labor Agreement," 7 Stan. L. Rev. 445, 456 n. 59 (1955). But a realistic view of the way labor relations are carried on shows that there are few instances where this is the case. It would therefore be anomalous to read into the Act a requirement of exact mutuality of remedies, whatever force that concept may have in other contexts. Equitable relief against any party, if available under the holding of this opinion, must be molded, where necessary, to stay out of the "forbidden territory" delimited by the Norris-LaGuardia Act. Cf. *Fitzgerald* v. *Abramson*, 89 F. Supp. 504, 512 (S.D. N.Y. 1950).

II

This case is not disposed of by holding that the Norris-LaGuardia Act does not negative the existence of jurisdiction, for the plaintiff cannot prevail in the end unless there is also an affirmative basis upon which to grant the remedy sought. In view of its disposition of the Norris-LaGuardia issue, the court below did not reach this

question. Since it is purely a question of law, and was fully briefed and argued here, we proceed to resolve it in the first instance.

Preliminary to our task, however, is the choice of law problem: In this suit under §301, do we look to federal or state sources to determine the availability of specific enforcement as remedy for breach of a promise to arbitrate? This is the problem largely left open by our second opinion in *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, decided March 6, 1956, wherein we held that §301 was a constitutional exercise of the power of Congress to confer jurisdiction on the lower federal courts, regardless of the source of the law used to resolve certain issues determinative of the merits of a §301 case. We did suggest certain specific points, by way of illustration, as to which federal law would certainly rule the controversy, even though Congress might perhaps have chosen to leave other matters to be determined by an application of state law—a point we found it unnecessary to determine.

Of course, if §301 created a "generally applicable and uniform federal substantive right," as well as "a remedy . . . and . . . a forum in which to enforce it," as the enactment was described in *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union*, 182 F. 2d 806, 809 (C.A. 2d 1950), then there would be no question that federal law is applicable to all issues, whether deemed substantive or procedural.

If, on the other hand, a federal court in a §301 case may have to determine at least some substantive issues by reference to state law—which possibly is so—then the problem of choice of law governing the "forms and mode" of enforcing an arbitration agreement must necessarily be faced. Our answer in that event is in accord with the reasoning of Judge Wyzanski in *Textile Workers Union* v. *American Thread Co.*, supra, 113 F. Supp. at 141-42, relying on "the traditional rule that the availability of specific performance is a matter not of right, but of remedy, and that like other matters of remedy it is governed by the law of the forum. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109 . . ."

However, we must fit this conclusion into the analysis of arbitration enforcement recently made by the Supreme Court in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). In that case, a damage action based on a written contract for the employment

of an individual that included an arbitration clause, jurisdiction was founded solely on diversity of citizenship. One issue was the applicability of the doctrine of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), to the question of whether the lawsuit should be stayed in favor of arbitration. The Supreme Court held that "the remedy by arbitration . . . substantially affects the cause of action created by the State," 350 U.S. at 203, thereby invoking the test of *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 108-09 (1945), so that the question for that reason had to be decided according to state law, as if the district court were "only another court of the State." In our opinion the ruling in the *Bernhardt* case has no bearing on a suit under §301. As we explained in our second opinion in the *Mead* case, *supra,* decided March 6, 1956, jurisdiction in a §301 case is not based upon diversity of citizenship. Rather, it is based upon that provision of Art. III of the Constitution which extends the judicial power of the United States to cases "in Law and Equity, arising under . . . the Laws of the United States . . ."

Prior to the *Erie* decision, it was well accepted that the means for enforcing an arbitration agreement properly fell in the category of remedy or procedure. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U.S. 109, 123-25 (1924) (state statute); *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263, 277-79 (1943) (U.S. Arbitration Act). The *York* case, while recognizing that such questions normally are for the forum's own law, ruled that questions otherwise classified as questions of remedy and procedure must be determined in a diversity case according to state law when they may substantially affect the outcome of the case. That opinion and its progeny down to the *Bernhardt* case have emphasized the special demands of the diversity jurisdiction, as explained in the *Erie* and *York* opinions, as the basis for their rulings, and have given some indications of intent to limit to diversity cases their extensive reference to state "procedural" law. *E.g.,* see *Guaranty Trust Co.* v. *York,* supra, 326 U.S. at 101; *Bernhardt* v. *Polygraphic Co.,* supra, 350 U.S. at 202-03, 208. In other cases, considerations relevant to diversity suits have been held inapplicable where federal jurisdiction rested on other grounds, so that state procedural rules were not carried over even though the case involved some use of state law, *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946), or was founded on a state cause of action for wrongful death adopted as

part of the "general maritime law" enforceable in admiralty, *Levinson* v. *Deupree*, 345 U.S. 648 (1953). See *Doucette* v. *Vincent*, 194 F. 2d 834, 842 n. 6 (C.A. 1st, 1952). Therefore we believe that in a §301 case the *Erie*, *York* and *Bernhardt* decisions do not require us to apply state law concerning the "forms and mode" of enforcing an arbitration agreement.

This conclusion drawn from examination of the post-Erie cases is reenforced by recalling that the remedial powers of a federal court in a labor controversy are sharply restricted. The many limitations thrown up by provisions of Title 28, by the Norris-LaGuardia Act, and by §301 itself must be complied with in any event, as the first section of this opinion illustrates. Cf. *Guaranty Trust Co.* v. *York*, supra, 326 U.S. at 105. Reference in addition to state law for the availability and forms of specific enforcement would complicate and hamper the district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states. Some grant no specific enforcement, others expressly deny it to collective bargaining contracts; many limit enforcement to agreements submitting an existing dispute, others enforce agreements to submit future disputes only if restricted to disputes that could be the subject of a lawsuit. Few states have provisions of effective scope for specific enforcement of labor arbitration promises. See Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," *17 U. Chi. L. Rev. 233, 240-42* (1950). In Massachusetts, it is not at all clear what is the present status of such enforcement. See Mass. G.L. (Ter. Ed.) C. 251, §14, *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 636 (1944); Mass. G.L. (Ter. Ed.) C. 150 §11, Magliozzi 1. *Handschumacher & Co.*, 327 Mass. 569 (1951); Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arb. J. (N.S.) 5, 9-13 (1953).

## III.

This brings us to the availability and appropriateness, as a federal equitable remedy in a §301 case, of a decree for specific performance of an agreement to arbitrate. In this connection, we do not forget the historic hostility of the judges, both at common law and in equity, to agreements for the submission of disputes to arbitration, and their manifested unwillingness to give such agreements

full effect. Thus, while a valid award was enforceable at law or in equity, failure to satisfy all of the numerous formal or procedural rules would render an award invalid. Specific performance of a submission to arbitration was granted if the submission had been made a rule of court or was limited to subsidiary issues in a lawsuit. But the specific enforcement of arbitration in general was barred by a pair of complementary rules that left nominal damages as the only remedy for breach of the promise to arbitrate: A submission was revocable by either party until the award was rendered; an agreement to submit future disputes to arbitration was invalid as an ouster of the jurisdiction of the courts. See Gregory and Orlikoff, *supra* at 235-38.

These rules were long embedded in the decisions of the federal, as well as state and English, courts. See *Red Cross Line* v. *Atlantic Fruit Co.*, supra, 264 U.S. at 120-23; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915). A generation or more ago Congress and many state legislatures were persuaded by the advocates of arbitration to reject this body of doctrine by enacting arbitration statutes. In perhaps only two states was the change accomplished by judicial overruling of the common-law restrictions on specific enforcement. See Gregory and Orlikoff, *supra* at 254. That history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing. But cf. *Bernhardt* v. *Polygraphic Co.*, supra, 350 U.S. at 209-12 (concurring opinion).

Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could overrule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.

A number of courts have held that §301 itself is a legislative

authorization for decrees of specific performance of arbitration agreements. *E.g., Textile Workers Union* v. *American Thread Co.,* supra; *Wilson Bros.* v. *Textile Workers Union,* supra; *Local 207* v. *Landers, Frary & Clark,* supra; *The Evening Star Newspaper Co.* v. *Columbia Typographical Union,* 124 F. Supp. 322 (D.D.C. 1954); cf. *Milk Drivers Union* v. *Gillespie Milk Products Corp.,* supra. We think that is reading too much into the very general language of §301. The terms and legislative history of §301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947); H.R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting §301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. For example, in the *American Thread* case Judge Wyzanski deemed the U. S. Arbitration Act inapplicable, but no sooner had he ruled that §301 authorized a decree for specific performance than he was faced with the need to adopt "as a guiding analogy" the procedure of §5 of the U. S. Arbitration Act with respect to one such detail, the appointment of an arbitrator. 113 F. Supp. at 142. Thus it seems to us that a firmer statutory basis than §301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements.

## IV.

The federal statute that does contain an integrated system for compelling arbitration is the United States Arbitration Act, first passed in 1925 (43 Stat. 883) and then codified and enacted into positive law as Title 9 of the U. S. Code in 1947 (61 Stat. 669), with one subsequent technical amendment (68 Stat. 1233).

The structure of the Act is as follows: Section 2, subject to definitions and an exclusion in §1, provides that:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

If a suit is brought in a federal court, and the court "being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," §3 requires that it "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," providing the applicant is not in default in proceeding with the arbitration. And specific performance, the remedy sought in the instant case, is authorized in §4 in these terms:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directly that such arbitration proceed in the manner provided for in such agreement."

That section goes on to detail the procedure for litigating defenses to such an order. Further details of procedure in court and before the arbitrator are given in §§6-8, 12-13. As already noted §5 provides a method for appointing an arbitrator, where necessary. Finally, §§9-11 state the effect of an award and detail the grounds for confirming, vacating, modifying, or correcting an award.

The heart of the Act is contained in §§2, 3, 4. Although each of them states its scope in different terms, it has now been authoritatively held that §2 defines the scope of §3, on a basis that implicitly reaches §4, as well. *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 201-02. Thus the remedy of an original action for specific performance under §4 is available only as to an arbitra-

tion agreement contained in the types of contracts defined by §2 as qualified by §1.

It is not usual terminology to refer to a labor contract as "evidencing a transaction involving commerce," but the *Bernhardt* opinion suggests that under proper circumstances an individual contract of hire would meet the test of §2. For the Court ruled §2 inapplicable to the situation of the particular employee involved in that case by saying (350 U.S. at 200-01):

> "Nor does this contract evidence 'a transaction involving commerce' within the meaning of §2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

If the employment contract there involved would have been subject to §2 had such a showing been made, then a collective bargaining contract should *a fortiori* be held to be within the scope of §2. Although it does not consummate the employment relationship, which may be the "transaction," the collective agreement sets the terms and conditions under which not one but hundreds or thousands of workers are employed, and thus "involves" commerce to a greater degree than any single hiring transaction could. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). We conclude that a collective bargaining agreement may be within the terms of §2. See Sturges and Murphy, "Some Confusing Matters Relating to Arbitration under the United States Arbitration Act," 17 Law & Contempt. Prob. 580, 617-19 (1952); Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 598-99. Perhaps this is not so with respect to a collective bargaining agreement whose arbitration clause is not limited to controversies "arising out of such contract or transaction, or the refusal to perform the whole or any part thereof," as provided in §2 of the Arbitration Act. See *Metal Polishers Union* v. *Rubin*, 85 F. Supp. 363 (E.D.Pa. 1949). We express no opinion on that question; the arbitration clause in suit is limited to "Any matter involving the application or interpretation of any provisions of this Agreement . . ."

Section 2, however, must be read in connection with §1, which after defining "maritime transactions" and "commerce" in familiar terms, concludes with these enigmatic words:

> "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The *Bernhardt* case indicates clearly that this exclusion pertains to the entire Act. 350 U.S. at 201-02. We have then reached the ultimate major question of this appeal: Is a collective bargaining agreement a "contract of employment" within the meaning of §1? We hold that it is not.

The term in question admittedly is not a "word of art" with a fixed technical definition, but it seems more familiar today as an equivalent to what once was called the "contract of hire," referring to an individual transaction, rather than as a generic term that would also embrace union-negotiated collective agreements. The distinction between the two concepts (and a suggestion of the difficulty of definition) appears in a well-known quotation from Mr. Justice Jackson's opinion for the Supreme Court in *J. I. Case Co.* v. *NLRB*, supra, 321 U. S. at 334-35:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a *contract of employment* except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a *contract of employment.*" [Italics added.]

Compare the language used in §3 of the Norris-LaGuardia Act to define a "yellow dog contract," which of course would not be a union contract: "Every undertaking . . . in any contract or agreement of hiring or employment between any [employer] . . . and any employee or prospective employee : . ." (47 Stat. 70) But see *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310, 313 (C.A. 3d 1951), 65 Harv. L. Rev. 1239

(1952). See also Cox, "Grievance Arbitration in the Federal Courts" supra, 67 Harv. L. Rev. at 595-97.

If the words of §1 do not have a "plain meaning," the legislative history does not conclusively make them plainer. The committee reports and hearings in the Congress which passed the Act contain only one reference—an ambiguous one—to the meaning of the exclusion. See Joint Hearings before Subcommittees of Committees on Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 21 (1924); S. Rep. 536 and H.R. Rep. 646, 68th Cong., 1st Sess. (1924). The whole tenor of these documents, however, demonstrates that congressional attention was being directed at that time solely toward the field of commercial arbitration. The history of the arbitration bill before the previous Congress and in the American Bar Association committee which had drafted it shows that the exclusion was inserted to overcome an objection by the Seamen's Union. But even this bit of history is ambiguous as to whether the objection was made with reference to union arbitration or individual arbitration of seamen's wage disputes. Compare *Tenney Engineering, Inc.* v. *United Electrical orkers,* 207 F. 2d 450, 452 (C.A. 3d, 1953), with 65 Harv. L. Rev. 1240. When this basically weak type of legislative history is conceivably explainable on other grounds, such as objection to a new form of arbitration for seamen's individual contracts of hire (see 46 U.S.C. §651), we cannot attribute much force to it against a reading of the statutory language itself.

Court decisions are divided on the breadth of the exclusion in §1 of the U.S. Arbitration Act. Three circuits have held that it includes collective bargaining agreements. *Amalgamated Assn.* v. *Pennsylvania Greyhound Lines, Inc.,* 192 F. 2d 310 (C.A. 3d, 1951); *United Electrical Workers* v. *Miller Metal Products, Inc.,* 215 F. 2d 221 (C.A. 4th, 1954); *Lincoln Mills* v. *Textile Workers Union,* 230 F. 2d 81 (C.A. 5th, 1956). See also *Mercury Oil Refining Co.* v. *Oil Workers Union,* 187 F. 2d 980, 983 (C.A. 10th, 1951); *Shirley-Herman Co., Inc.* v. *International Hod Carriers Union,* 182 F. 2d 806, 809 (C.A. 2d, 1950). But cf. *Markel Electric Products, Inc.* v. *United Electrical Workers,* 202 F. 2d 435 (C.A. 2d, 1953). Despite this position, the Third Circuit will apply the Act to most collective bargaining contracts, on its

view that the exclusion only refers to collective agreements of transportation workers. *Tenney Engineering, Inc.* v. *United Electrical Workers,* 207 F. 2d 459 (C.A. 3d, 1953).

On the other hand, the Sixth Circuit, while denying a stay under §3 on other grounds, has squarely ruled that the exclusion covers only a "contract for the hiring of individuals," distinguishing its earlier cases apparently as being suits for wages upon contracts of hire incorporating the terms of a collective bargaining agreement. *Hoover Motor Express Co., Inc.* v. *Teamsters Union,* 217 F. 2d 49, 52-53 (C.A. 6th, 1954). Accord, *Lewittes & Sons* v. *United Furniture Workers,* 95 F. Supp. 851 (S.D.N.Y. 1951); see *United Electrical Workers* v. *Oliver Corp.,* 205 F. 2d 376, 385 (C.A. 8th, 1953); *Wilson Bros.* v. *Textile Workers Union,* supra, 132 F. Supp. at 165 (S.D.N.Y.); *Tenney Engineering, Inc.* v. *United Electrical Workers,* supra, 207 F. 2d at 454-55 (concurring opinion). The question was expressly passed over in the *American Thread* case, *supra,* 113 F. Supp. at 139.

With the legislative history and judicial treatment in the condition just described, we feel free to consider the statutory provision as carrying its own full meaning in what it says. The term "contracts of employment" serves to define in part the scope of a statute which created a governing code for a newly important system of adjudicating controversies, and which has assumed permanent status by codification. It may well be that the attention of Congress was focused on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration. Nevertheless, in enacting the Arbitration Act, Congress chose not to use apt language to confine the application of the Act to the field of commercial arbitration. If it be assumed that only in the period subsequent to 1925 did arbitration under collective bargaining agreements emerge as a factor of major importance, the most that could be inferred from that would be that Congress did not specifically advert to arbitration under collective bargaining agreements. But such inference would not be enough to warrant an interpretation excluding collective bargaining agreements from the coverage of the Arbitration Act. It would be necessary to go further and to conclude that, had Congress in 1925 foreseen the developing importance of arbitration under collective bargaining agreements, it "would have so

varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico* v. *The Shell Co.*, 302 U.S. 253, 257 (1937). There is no reason to suppose that this would have been so. Therefore, we hold that the exclusion in §1 does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment," and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act.

Some of those limitations have already been noted. Another which must be discussed is the provision of §4 which authorizes specific enforcement of an agreement to arbitrate by a district court "which, *save for such agreement*, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties . . ." [Italics added.] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955), has sharply curtailed the subject-matter jurisdiction of federal courts under §301 to adjudicate directly between union and employer a controversy over "terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." One court has already held that if the district court is barred by the *Westinghouse* decision from granting pecuniary relief on a wage controversy, it also lacks jurisdiction, by the terms of §4, to compel arbitration of that dispute. *Textile Workers Union* v. *Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). However, the effect of the *Westinghouse* holding, reflected in all the opinions of the majority justices, was to eliminate from §301 jurisdiction a complaint by a union that involves no more than a cause of action which is "peculiar in the individual benefit" or "the uniquely personal right of an employee" or which "arises from the individual contract between the employer and employee." 348 U.S. at 460, 461, 464. That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce. The promise of the employer to arbitrate, which frequently is linked in the contract or in negotiations with a union no-strike pledge, seems to us to be at the forefront of the contract terms for whose breach only the union

can effectively seek redress, and for whose breach §301 should therefore still be an appropriate source of jurisdiction. Indeed, the history of litigation under §301 shows that if cases seeking to compel an employer to arbitrate were thrown into the discard along with *Westinghouse*-type cases and those barred for trenching on exclusive NLRB jurisdiction, there would be no significant use a union could make of §301. Its terms and legislative history demonstrate that, as we have earlier said of the Norris-LaGuardia Act, it was not intended to be strictly a "one-way street." The *Westinghouse* opinions show no intent to create any such result. It seems to us therefore that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages, which the individual employee equally could enforce in a suit on his personal cause of action. On that analysis, "Jurisdiction . . . of the subject matter of a suit arising out of the controversy" will exist so long as the union is not asking for the relief available to the individual employee, and thus the test of §4 will be satisfied by a complaint which meets the terms of §301 itself. Cf. *Wilson Bros.* v. *Textile Workers Union*, supra, 132 F. Supp. at 166.

V.

The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it.

We have not passed upon the question of the arbitrability of the two grievances at issue here, although counsel for defendant informed us that the Company denies that they are arbitrable under the contract. Arbitrability is a question which the district court must pass on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. See, *e.g.*, *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co., Inc.*, 168 F. 2d 33 (C.A. 4th, 1948); *Markel*

*Electric Products, Inc.* v. *United Electrical Workers,* supra (majority and dissenting opinions). However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and whether the applicant has satisfied the contract procedures prerequisite to arbitration. See, *e.g., Wilson Bros.* v. *Textile Workers Union,* supra, 132 F. Supp. at 164-65; *Insurance Agents' Union* v. *Prudential Ins. Co.,* 122 F. Supp. 869, 872 (E.D.Pa. 1954). Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief under §§3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§10-11 of the Act. See, *e.g., Local 379* v. *Jacobs Mfg. Co.,* 120 F. Supp. 228 (D. Conn. 1953). See also *Goodall-Sanford, Inc.* v. *United Textile Workers,* No. 5029, decided today.

VI.

Plaintiff has submitted a motion to this court, under 28 U.S.C. §1653, to amend its complaint so as to allege diversity of citizenship between all the members of the Union and defendant, no doubt as a hedge against a ruling that relief could not be granted under the law applicable to a federal question case. In view of our decision this motion may have become moot, but it must in any event be denied, for it cannot accomplish the result intended. Rule 17(b) F.R.C.P.; *Donahue* v. *Kenney,* 327 Mass. 409 (1951); *Worthington Pump & Machinery Corp.* v. *Local 259,* 63 F. Supp. 411, 413 (D. Mass. 1945).

*The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.*

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No. 211

IN THE

# Supreme Court of the United States

OCTOBER TERM 1956

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TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR PETITIONER

---

### OPINIONS BELOW

The District Court did not issue an opinion. Its Findings of Fact and Conclusions of Law are set forth at pp. 33-36 of the record. The opinion of the Court of Appeals (R. 43-70) is reported in 230 F. 2d 81.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1956 (R. 131). On April 19, 1956, Mr. Justice Burton extended the time for filing a petition for certiorari to June 29, 1956 (R. 71). The petition was filed on June 28, 1956, and granted on October 8, 1956. (R. 71; 352 U.S. 821). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 136, provides, in pertinent part, as follows:

> Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669, and of the Norris-LaGuardia Act 29 U.S.C. §§ 101-115, 47 Stat. 70 are set forth in Appendix A *infra*, pp. 62-71.

## QUESTIONS PRESENTED

1. The ultimate question presented by the decision of the Court of Appeals is whether a federal district court has authority, in a suit brought by a union under § 301 (a) of the Labor-Management Relations Act, 1947, to compel compliance by an employer with his contract to arbitrate disputes arising under a collective bargaining agreement with the union.

2. Subsidiary questions, involved in determination of this ultimate question, are:

(a) Whether the court has jurisdiction over the suit under § 301 (a).

(b) Whether the Norris-LaGuardia Act prevents the granting of the relief sought.

(c) Whether reference is to be made to state or federal law to determine the enforceability of contracts to arbitrate.

(d) Whether § 301(a) itself, in the context of the Labor-Management Relations Act, makes such contracts enforceable in the Federal Courts.

(e) Whether the United States Arbitration Act (9 U.S.C. §§ 1-14) is applicable and, if it would be otherwise applicable, whether a collective bargaining agreement is excluded from its coverage as a "contract of employment."

## STATEMENT

The petitioner, Textile Workers Union of America (hereinafter referred to as the Union), is a labor organization representing the employees of the respondent, Lincoln Mills of Alabama (hereinafter referred to as the Company). Lincoln Mills is a corporation owning and operating a textile mill in Huntsville, Alabama. It is engaged in an industry affecting commerce and is subject to the Labor-Management Relations Act, 1947.

In June, 1953, the parties entered into a collective bargaining agreement. (R. 4-18). This agreement, like most such agreements, established the wages, hours and other conditions of employment which would prevail during its term. It provided that during its term there would be no strikes, work stoppages or intentional slowdowns in view of the agreement between the Company and the Union that "the grievance procedures provided herein are adequate to provide a fair and final determination of all grievances . . . . (R. 15)." The grievance procedures thus referred to set forth three steps of discussion between Union and Company representatives at various levels over any dispute "arising from the operation or interpretation of this agreement." (R 13). The fourth step of the procedure was arbitration. (R. 14, 16).

The agreement provided that any "dispute between the Union and the Employer arising from the operation or interpretation of this agreement which pertains to wages, rates of pay, hours of work or other conditions of employment

which has not been satisfactorily adjusted" in the earlier steps of the grievance procedure could be submitted to arbitration by either party. The party desiring arbitration simply notified the other party within a specified time limit. Then, under the agreement, the parties were to confer and endeavor to agree upon the selection of an arbitrator. In the event of failure to agree, an arbitrator was to be chosen by a pre-arranged method from a list to be supplied by the American Arbitration Association.

The controversy in this case involves 10 grievances filed by employees in the first step of the grievance procedure in June, 1954. These grievances principally concerned work loads and work assignments, a subject covered by the provisions of Article V of the agreement (R. 11-13). The general nature of the complaints was that the company had assigned additional duties to the complaining employees and had reduced the number of employees to do specific jobs.[1]

Under Article V of the agreement the Company had the right to make such changes "based on sound management, engineering principles and practices" upon written notice. There then followed a four-week trial period, during which the employees were obliged to cooperate "in order to give the changes a reasonable and fair test." At the end of the trial period, either the affected employee or the Union was entitled to file a grievance. If such a grievance was not settled and was taken to arbitration, the parties specified that the decision was to be based upon the Company's detailed standards and studies and the union's objections to them as measured by the general principles set forth in the agreement. In the arbitration article of the agreement a method was provided by which grievances relating to work loads and assignments would be arbitrated by "qualified textile technicians or persons who by prior experience or training" were qualified to decide the question (R. 17).

[1] The individual grievances are set forth on pp. 19-28 of the record.

The grievances were processed by the Union through the various steps of the grievance procedure set forth in the Agreement. They were finally denied by the Company in the third step of the grievance procedure on July 14, July 15 and July 22, 1954. The collective bargaining agreement had expired, pursuant to notice given under its terms, on July 3, 1954 (R. 34).

The Union then requested the Company to submit the grievances to arbitration as provided for in the collective bargaining agreement. The employer refused (R. 34). The Union thereupon brought this suit against the Company asking for an order directing the Company to perform its obligation to arbitrate and asking, in addition, for damages.

The Company conceded the facts (R. 31-32) and defended on two principal grounds: (1) that the contract had expired and hence the agreement to arbitrate could no longer be enforced, and (2) the court was without jurisdiction to grant the relief requested.

The District Court on April 29, 1955, issued its findings of fact and conclusions of law. (R. 33-36). The Court concluded that it had jurisdiction and that the Union had a right to maintain an action to compel arbitration by virtue of the provisions of Section 301(a) of the Labor Management Relations Act of 1947. The expiration of the collective bargaining agreement, the Court held, did not relieve the Company of its obligation to arbitrate, particularly in view of the fact that the grievances were in fact processed through the first three steps of the grievance procedure up to the point of arbitration after the expiration of the agreement. With respect to the claim for damages, the District Court held that the Union had not proven any damages and was not entitled to recover.

On the basis of these findings and conclusions, the District Court ordered the Company to comply with the arbitration provisions of the collective bargaining agreement. (R. 36).

On appeal, the Court of Appeals reversed by a 2-1 vote. The opinion for the majority (R. 43) was delivered by Judge Jones and the dissent (R. 50) by Judge Brown.

All of the judges were agreed that the District Court had jurisdiction over the suit under Section 301(a) (R. 45, 55). They also expressly agreed that the Norris-LaGuardia Act did not prevent the issuance of the order which had been entered by the District Court (R. 46, 60).

The majority held, however, that in a suit brought under Section 301 an executory agreement to submit disputes to arbitration would not be specifically enforced in the absence of a showing that such agreements were specifically enforceable in the courts of Alabama. In reaching this conclusion, the majority first concluded that the U. S. Arbitration Act does not authorize enforcement of arbitration provisions in collective bargaining agreements. It then proceeded to consider whether Seciton 301(a) itself could be regarded as providing a basis upon which such agreements could be enforced. In the light of the opinions of the justices of this Court in the *Westinghouse* case, 348 U.S. 437, the majority concluded that Section 301(a) was procedural only and created neither a substantive right nor a substantive remedy. Finding that neither the Federal common law nor the common law of the State of Alabama authorized the specific enforcement of agreements to arbitrate, the Court concluded that there was no basis upon which it could enforce such an agreement in this case. In view of that holding, it expressly waived consideration of the question of whether the agreement to arbitrate could otherwise be enforced after the termination of the agreement.

Judge Brown, in his dissent, assumed with the majority that Alabama would not specifically enforce an agreement to arbitrate. He also assumed that the United States Arbitration Act was not available to give specific statutory authorization for a federal remedy. He argued, however, that the injunctive relief sought was both common and tradi-

tional. In the light of the plain congressional policy in favor of arbitration in labor matters, he argued that the Federal District Courts, having been given jurisdiction by Section 301, were free to grant the relief requested as part of their traditional and inherent powers. In addition, he argued, a basis for issuing an order directing the employer to comply with his contractual commitment to arbitrate could be found by using Section 301 "in a modified substantive way". "The agreement to arbitrate," he said, "for employer and employees alike, goes to the very heart of the collective contract. The native forces of competing economic pressures are held in leash by it. Repudiation by either is a challenge which § 301 sought to answer. If it is not available here, then nought is left of § 301 but the right to sue for money damages. Had that been the narrow hope of Congress, just such simple words would have been used." (R. 69-90).

## SUMMARY OF ARGUMENT

I. The District Court clearly had jurisdiction over the cause of action under Section 301(a). Here, unlike *Westinghouse,* the claim is not for the payment of wages to individual employees but a claim that the employer has refused to perform his agreement with the union, as such, to arbitrate. Furthermore, utilization of Section 301(a) here would not provide, as in *Westinghouse,* an alternative method to the one specified in the collective agreement for the resolution of disputes but would, rather, compel the parties to utilize the procedure upon which they have agreed.

II. The District Court had power to grant equitable relief. Section 301(a) is a general grant of jurisdiction and is not limited to suits for damages. This is the plain meaning of its language and must be the construction to be given it, since a limitation to damage suits would in effect eliminate all union suits under a statute expressly permitting suits by unions.

III. The Norris-LaGuardia Act does not prevent the granting of equitable relief although this is a "labor dispute" within the meaning of the Act. The only provision of the Norris-LaGuardia Act which can be argued to be applicable here is Section 7. But Section 7, when read in conjunction with the rest of the Act, plainly is the procedural counterpart of Section 4 and is intended to apply only to requests for injunctive relief which, absent allegations of fraud, violence, or illegality, Section 4 would prohibit. This construction of Section 7 avoids a nonsensical result and is in accord with the prior decisions of this Court.

IV. If the above propositions are correct, the only bar to the relief granted by the District Court here is the common-law rule against the enforcement of executory agreements to arbitrate. That rule is properly applicable only to commercial arbitration since the premise upon which it is based is that arbitration is a substitute for litigation.

Labor arbitration, unlike commercial arbitration, is not a substitute for litigation. It is a substitute for a strike. This is clearest in the case of an arbitration which is agreed upon as a method of settling a strike as to what the terms and conditions of employment shall be. It is equally true of grievance arbitration—the arbitration of differences as to the meaning and application of a collective agreement.

The nature of grievance arbitration, and its distinction from commercial arbitration, is particularly clear in this case. The parties dealt with strikes during the term of the agreement and with arbitration as two sides of the same coin. The agreement that there should be no strikes was expressly made on the basis of the establishment of a grievance and arbitration procedure for the settlement of all differences as to the meaning or application of the agreement.

V. The difference between commercial arbitration and grievance arbitration is a sufficient basis upon which to hold the traditional rule against the enforcement of commercial

arbitration agreements to be inapplicable. If it is inapplicable, the District Court having jurisdiction over the suit and the parties and having the power to grant equitable relief, had the necessary power to grant specific performance. This was the view of Judge Brown, dissenting, below and we concur with it.

If a specific statutory basis is required, Section 301(a) provides that basis. The Congressional purpose in enacting Section 301(a) was to insure industrial peace by providing a remedy in cases in which no strike agreements were violated. The agreement to arbitrate disputes arising during the term of a collective agreement is the consideration for and necessary counterpart of the agreement not to strike. The two are essentially one clause. And Congress left no doubt that it intended both parties to have access to the Federal Court in cases in which such a clause was not performed.

It is true that no specific consideration was given to the arbitration side of the no-strike clause. But this is because the sponsors of the legislation did not examine any case in which an employer refused to abide by a collective agreement. They believed that only unions violated such provisions. They intended, however, to give a remedy to both sides. And if any fair meaning is to be given to Section 301(a) it must therefore be construed as protecting both the employer and union interest in the reciprocal no-strike arbitration provision. The employer's interest can be protected by permitting him to recover the financial damages which he may suffer as a result of a violation of the agreement not to strike. The union's interest can only be protected by specific performance of the reciprocal agreement to arbitrate.

VI. Reliance on Section 301(a) as the statutory basis for granting specific performance of the agreement to arbitrate grievances creates no practical problems of significance. Contrary to Judge Magruder's opinion in the *General Electric* case, the procedural specifications and safeguards of a

typical arbitration statute are neither necessary nor, indeed, very appropriate to grievance arbitration. They are contained in arbitration statutes because such statutes are designed for commercial arbitration used as a substitute for litigation. They envisage a proceeding, much like that before a master appointed by a court, which terminates in a judgment as to money damages. Grievance arbitration serves a different purpose and normally culminates in a different result.

VII. In our view of Section 301(a) there is no constitutional problem since the Section is construed as providing for the substantive enforceability of the agreement to arbitrate. In any case, it is improper to distort the expressed intention of Congress to provide equal enforcement of rights in order to avoid a constitutional question which will have to be met and decided in a case in which an employer recovers damages against a union.

The same considerations apply to the forum-shopping problems and the federal-state problems mentioned in Mr. Justice Frankfurter's opinion in the *Westinghouse* case. All are equally applicable to suits which Congress clearly intended employers to be able to bring in the Federal Courts. Since it is impossible to construe Section 301(a) as eliminating these problems when an employer sues, the scope of a union's remedy under Section 301(a) should not be reduced in order to avoid these problems.

VIII. If our argument that grievance arbitration is sufficiently different from commercial arbitration as to justify a holding that the common law rule against specific performance is inapplicable is not accepted then the same result must be reached by virtue of the United States Arbitration Act in accordance with the opinion of the First Circuit in the *General Electric* case. The Arbitration Act was intended to abolish the common law rule in the Federal Courts. It would be incongruous to hold that grievance arbitration is

the only surviving victim of a rule which no longer exists in the area of its proper applicability unless there was the clearest evidence that Congress intended this result. No such evidence exists.

Grievance arbitration was, in fact, practically unknown when the Arbitration Act was passed and could not have been intended to be excluded. Congress did exclude arbitration provisions in contracts of employment. The history of the opposition by the International Seamen's Union to the Act as originally drafted makes it clear that this exemption was intended to exclude individual contracts of hire. If, despite this history, it is concluded that a collective agreement should be considered a contract of employment, then the exclusion from the Act of contracts of employment should be limited to workers engaged in foreign or interstate commerce, in accordance with the conclusion of the Second and Third Circuits.

No problem is presented by the provision, in Section 4 of the Arbitration Act, that an order directing arbitration can only be granted by a District Court which save for the agreement to arbitrate would have jurisdiction. The claims involved in this case are clearly not the kind of claims which are excluded from the scope of Section 301(a) by the decision of this Court in the *Westinghouse* case.

## ARGUMENT

### I—THE DISTRICT COURT HAD JURISDICTION.

In none of the three cases which the court now has before it, nor in any of the cases in the other circuits in which the question has arisen as to whether arbitration can be compelled in a suit brought under Section 301 of the Labor-Management Relations Act, has any court expressed doubt that it had jurisdiction over the cause of action. The Court of Appeals for the Fifth Circuit in this case did come to the ultimate conclusion that the District Court had no power to

grant the relief requested by the union, but it specifically held that it did have jurisdiction over the case (R. 45).

Despite this unanimity of opinion, the question of jurisdiction is so central to our argument, and this Court's decision in *Association of Westinghouse Employees* v. *Westinghouse Corp.*, 348 U.S. 437 (1955), is so recent, that it seems desirable to present briefly the consideration which we believe support the conclusion of the court below that it have jurisdiction.

Section 301(*a*) provides that the federal district court shall have jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . . ." Section 301(*b*) provides, in part, that "any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." Section 301 (*b*) clearly establishes the proposition that when a union is brought before a federal district court in a case over which the court otherwise has jurisdiction it shall be treated procedurally as though it were a natural or corporate entity, irrespective of the fact that at common law it could not be so considered because it was an unincorporated association. It thus supplies the procedural remedy for what was thought by Congress to be the principal obstacle to suits involving unions.

Section 301 (*a*), equally clearly, does something more than Section 301 (*b*). It provides, in terms as simple as it is possible to write, that the federal district courts shall have jurisdiction over suits for breach of contract between the unions and employers subject to the National Labor Relations Act. It thus supplies the basis upon which the District Courts may take jurisdiction and apply the procedural rules set forth in 301 (b).

This is, beyond question, a suit for breach of contract between an employer and a labor union subject to the national Act. It meets all of the requirements of 301 (a).

The only possible doubt as to the District Court's jurisdiction, therefore, must come from the gloss on Section 301 which was written by the Justices of the Court in the *Westinghouse* case.

In *Westinghouse* the union filed a complaint charging that the employer had failed and refused to pay to employees certain wages alleged to be due under the terms of the collective agreement and asking that he be compelled to make these payments. This Court held that there was no jurisdiction over such a complaint under Section 301. We will not attempt to restate the reasoning which led six Justices of this Court, in three separate opinions, to come to this conclusion. It is sufficient, we believe, to recall simply that in the opinion of three Justices (Frankfurter, Burton, and Minton), this result was dictated by the fact that the suit was "based upon an employer's failure to comply with the terms of collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." 348 U.S. at 460. In the opinion of two other Justices (Warren, Clark), the suit failed because its subject matter was "the uniquely personal right of an employee . . . . to receive compensation for services rendered his employer." 348 U.S. at 461. In the opinion of the sixth Justice (Reed) who concurred in the result, the reason was that the breach alleged—the failure to pay wages—was a violation only of the "separate hiring contracts between the employer and each employee, a situation not believed by the Justice to be covered by the statute. 348 U.S. at 464.

Some of the opinions, of course, contained language expressing more broadly applicable theories as to the meaning and scope of Section 301. But there was no opinion of the Court and the theories expressed in the three concurring opinions converged only on the narrow proposition that there was no jurisdiction over a complaint in which a union

plaintiff alleged simply that the employer had failed to pay to the employees the wages required by the collective agreement.

That proposition is plainly inapplicable to this case.[2] Here the suit is based on the failure of the employer to comply with the provisions of the agreement relating to arbitration, provisions which run to the union as such by the terms of the agreement and which, when violated, give a cause of action only to the union. The collective agreement itself specifies that the arbitration provision only applies to disagreements or disputes "between the Union and the Employer" (R. 16) and that it may be invoked "by either party" to the agreement (R. 17). Indeed, under the contract, a grievance can only arrive at the posture at which arbitration is provided for if the union, through its "General Shop Committee" in Step 2, and its "representative" in Step 3, has processed it through these earlier steps of the grievance procedure. This is, as Judge Brown below said, "on all tests, a *union* controversy in which the union is asserting in its collective capacity a demand relating to all of the employees as a group . . ." (R. 55; emphasis in original).

There is a further distinction between this case and *Westinghouse,* a distinction which rests upon a difference between the contracts sued upon rather than upon the kind of relief requested. In *Westinghouse,* the contract between the employer and the union was of the kind which, while once perhaps frequent, has now become increasingly raer: It provided for grievances as to the application and in-

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[2] We think it would also be inapplicable to a case in which the complaint did not simply allege a failure to pay compensation, as in Westinghouse, but also alleged that such failure to pay resulted from the adoption by the employer of a uniform rule of interpretation of the *collective* agreement contrary to that claimed to be applicable by the other party to that agreement—the union. See *United Steelworkers of America* v. *Pullman Standard Car Co.,* 37 LRRM 2696 (W.D. Pa. 1956) now pending in the Court of Appeals for the Third Circuit, Docket No. 11,894.

terpretation of the agreement but it did not provide for any final settlement of such grievances if the union and the employer were unable to agree. Instead, the contract provided that if any grievance could not be settled by negotiation the union would have the right to strike in support of its position.[3] The question in *Westinghouse,* then, was whether Section 301 should be read as giving the union the additional right to bring suit, instead of striking, over unresolved grievances.

In this case, on the other hand, as in the other cases now before the Court, the parties have provided a method for settling grievances which they cannot resolve. As in more than 90% of the collective agreements in force today,[4] the agreement provides that if the parties cannot settle a grievance they will submit it to arbitration. The question here, then, is not whether § 301 should be read as supplying a method of settling grievances above and beyond that provided in the collective agreement. The question here is whether the Court will, in a § 301 proceeding, require the parties to utilize the procedure which they have previously agreed shall be used for that purpose.

We conclude, therefore, that whatever other significance the opinions in the *Westinghouse* case may have for the result here, they plainly do not take this case out of the explicit statutory grant of jurisdiction which is set forth in Section 301(a).

## II—APART FROM THE NORRIS-LaGUARDIA ACT, THE DISTRICT COURT HAD POWER TO GRANT EQUITABLE RELIEF.

As in the case of jurisdiction, all the circuit courts seem agreed that a district court has power in a suit brought

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[3] Record, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, No. 51, October Term, 1954, p. 32.

[4] *Arbitration Provisions in Collective Agreements, 1952,* 76 Monthly Labor Review 261 (1953); Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* 51:7 (1956).

under Section 301 to grant equitable relief. Whether that power is restricted, and to what extent, by the Norris-La Guardia Act and by common law doctrines relating to the enforceability of agreements to arbitrate we will consider below. Here we concern ourselves only with the simple question of whether there is anything in Section 301 which would lead to the conclusion that, irrespective of these problems, no equitable relief can be granted.

The answer to this question seems so clear that there is little reason to discuss it at length. Congress, in the same statute, indeed in the same title, clearly indicated that it knew how to provide for actions in which only damages could be given. In Section 303, it provided that persons injured by certain kinds of secondary boycotts could sue in any district court of the United States, subject to the provisions of Section 301 and, in such case, should "recover the damages by him sustained and the cost of the suit." In contrast, Section 301 itself provides, without limitation or qualification, that "suits" may be brought in the district courts of the United States for violation of collective agreements.[5] Every court of appeals, including the court below in this case and the First Circuit in the *General Electric* and *Goodall-Sanford* cases, Nos. 276 and 262, which has had occasion to pass upon the point has agreed that this unambiguous language cannot be read as limited to actions at law for damages. *AFL* v. *Western Union Telegraph Co.*, 179 F. 2d 535 (6th cir. 1950); *Milk and Ice Cream Drivers*

[5] In the *Westinghouse* case, Mr. Justice Frankfurter's opinion found significance in the differences between Section 10 of the Case bill which was passed but vetoed in 1946 and Section 301(a) of the Taft-Hartley Act. The language of the Case bill, the opinion concedes, gave support to the view that a federal cause of action was to be created. 348 U. S. at 445. Changes in the subsequently drafted §301 (a) were therefore believed to argue against that view. Similar reasoning supports our argument that equitable relief is encompassed within the language of Section 301(a). For the Case bill conspicuously authorized only a "suit for damages" while Section 301(a) encompasses, without restriction, "suits for violation of contracts."

*Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (6th cir. 1953); *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529, 534 (4th cir. 1951). See also *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953).

To this list must be added, of course, this Court's decision in the *Westinghouse* case. Whatever else may be said about that decision, it did not hold that the relief there sought—on order directing the employer to make an accounting and to pay over to the employees the moneys shown thereby to be due—was not available because it was equitable in nature. All of the Justices seemed to be in agreement at least on the point of not finding this to be a reason why the action could not be maintained.

Any other conclusion, furthermore, would totally eliminate from the purview of Section 301(a) any suits by unions, despite the express language of the section that suits may be brought by both unions and employers and despite the expressed intention of Congress to make collective agreements "equally binding and enforceable on both parties."[6] This Court has already held in the *Westinghouse* case that a union cannot sue to recover moneys due to employees under the terms of a collective agreement. Even if we assume that such a suit is the same thing as an action for damages, which it is not, there are left only the promises to the union as such to be vindicated in a union suit under Section 301(a). But, with the lone exception of the payment of dues checked off by the employer, an employer normally does not make any promise to the union, as such, which can be vindicated in an action at law.[7] The very nature of the relationship between employer, employee and union is such that a claim for relief for promises made to the union

[6] S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1947) P. 15.

[7] Indeed, even with respect to the check-off, the appropriate relief in the case of a refusal to transmit dues collected would be the equitable remedy of an accounting, not a suit for damages.

must necessarily be equitable in nature; the unions damages in case of a breach of the collective agreement are never of the kind which are compensable in specific monetary terms.

## III—THE NORRIS-LA GUARDIA ACT DOES NOT BAR THE EQUITABLE RELIEF REQUESTED HERE

As with our first two points, there is substantial unanimity among the circuit courts of appeal that the Norris-La Guardia Act does not stand in the way of the relief sought here. The point was discussed in the argument of the case in the court below and summarily disposed of (R. 46). Joining the Fifth Circuit in this conclusion are the First Circuit in the *General Electric* and *Goodall-Sanford* cases, Nos. 276 and 262; and the Sixth Circuit in the *Milk and Ice Cream Drivers Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650 (1953), and in *Local 19* v. *Buckeye Cotton Oil Co.*, 236 F. 2d 776 (1956).

This unanimity is fully justified. Any contention to the contrary would involve such a gross distortion of the background, history, and acknowledged purpose of the Norris-LaGuardia Act as to be unthinkable. The policy and purposes of the Norris-LaGuardia Act are fully stated in Section 2. It is sufficient to quote it to set at rest any contention that the Act should be construed as forbidding the kind of relief requested here:

> "It is necessary that [the individual worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and lim-

itations upon the jurisdiction and authority of the courts of the United States are enacted."

That a statute with this stated purpose should not sensibly be applied to prevent the issuance of an order directing performance of an agreement to arbitrate is further buttressed by this court's disposition of similar contentions when they were offered in an attempt to prevent the issuance of injunctive relief to prevent violation of the provisions of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232 (1949). As Mr. Justice Jackson said for a unanimous court in the *Graham* case, to construe the Norris-LaGuardia Act to deprive the federal courts of jurisdiction "would be to strike from labor's hands the sole judicial weapon it may employ to enforce such rights as these petitioners assert and which we have held are now secured to them by federal statute." It "would indeed be to 'turn the blade inward'." 338 U.S. at 237.

That this rejection of the applicability of the Norris-LaGuardia Act was not conditioned by special provisions in the Railway Labor Act having no applicability to workers subject to the National Labor Relations Act is plainly demonstrated by this Court's decisions in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953) and *Syres* v. *Oil Workers Union,* 350 U.S. 892 (1955). Although, as petitioners point out in the *General Electric* case, No. 276, the Court in neither of these cases expressly rejected the contention that its earlier holding was limited to Railway Labor Act cases, the disposition of both these cases, and the omission of any discussion of the Norris-LaGuardia Act, should make it clear that the Court did not regard Norris-LaGuardia as posing any bar to the relief sought.

The considerations we have mentioned make clear, we believe, the result which must be reached on this point. They do not, however, detail the precise mechanism by which the power of a court to grant equitable relief is to be

fitted into the particular provisions of the Norris-LaGuardia Act. On this question we think that Judge Magruder's opinion for the First Circuit in the *General Electric* case provides the key.

Judge Magruder did not hold, and we do not urge, that this is not a "labor dispute" within the definitions set forth in Section 13 of the Norris-LaGuardia Act. We do not, in other words, tender an invitation similar to that tendered by the Brotherhood and rejected by the court in *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 238 (1949). Nor do we contend the Norris-LaGuardia should be regarded as repealed or modified *pro tanto* by Section 301.

No such broad conclusions are required because the problem is essentially a very narrow one. If we concede that this is a "labor dispute", and that Section 301 has not repealed or modified the Norris-LaGuardia Act, the question still remains as to whether it prevents the issuance of the relief here sought. To answer this question, we have to examine the structure and provisions of the Act.

There are essentially two operative parts. The first, contained in Sections 3, 4, 5, and 6, sets forth certain specific kinds of injunctive relief which can never be given and certain specific grounds for relief which can never be urged. "Yellow dog" contracts cannot be enforced (Section 3); strikes, membership in a labor organization, the payment of strike benefits, peaceful picketing, and other enumerated acts can never be enjoined (Section 4); injunctions cannot be issued on the ground that a combination to do the acts enumerated in Section 4 constitutes a conspiracy (Section 5); unions cannot be held responsible for the acts of their members or agents without proof of authorization or ratification (Section 6).

The second portion of the Act (Sections 7, 8, 9, 10) is procedural. The earlier sections, and particularly Section 4, do not outlaw all injunctions against strikes or picketing or

other concerted activity. They protect, against injunctive relief, only "lawful" assistance to persons involved in labor disputes, picketing "not involving fraud or violence," and assemblies which are "peaceably" conducted. It could not be otherwise. The effort to prevent an anti-labor judiciary from using the injunctive weapon as a means of destroying unions and interfering with strikes could not go so far as to prevent the issuance of injunctive relief where there was fraud, violence or similar illegality and the threat of immediate damage was great. But, by providing exceptions to the absolute bar of Section 4 in such cases, a wide gap would be created through which that judiciary presumably could gallop unless procedural restraints were established to ensure that the illegality, fraud, or violence which would prevent the absolute bars of Section 4 from applying really existed.

And, so, in the succeeding sections we have a set of procedural requirements. Section 7 requires that there be specific findings that unlawful acts have been committed or threatened, that they will continue, that the injury will be substantial and irreparable, that there is no adequate remedy at law and, most significantly, that the public officers charged with the duty to protect the complainants' property are unwilling or unable to do so. It provides further that these findings be made after a hearing in open court, with opportunity for cross-examination and testimony in opposition, and it provides the most limited kind of authority for temporary restraining orders with provisions for security. Section 8 makes exhaustion of remedies to settle the dispute, including arbitration, a prerequisite of relief. Section 9 limits the extent of any injunction which may be issued upon the findings required by Section 7 to the specific acts complained of and included in the findings. Section 10 provides for immediate review.

The question here is whether these procedural requirements, and particularly the requirements of Section 7, ap-

ply in a case in which the relief sought is specific enforcement of an agreement to arbitrate. The language of Section 7 can conceivably be read to apply to such a case, since it says that no injunction shall be issued in a case growing out a labor dispute except upon the specified findings. But it can only be so read in isolation from the rest of the statute. If the statute is read as a whole, Section 7 is immediately seen to be a counterpart to Section 4. Section 4 forbids the federal courts to enjoin certain actions unless there is unlawfulness, fraud, or violence; Section 7 provides the procedure to be followed when it is claimed that these exceptions are involved.

This construction of Section 7 makes sense of its provisions and of the decisions in this Court which have held it to be inapplicable. In all of those cases the relief sought—recognition of a union, discontinuance of racial discrimination—was not of the kind which, absent allegations of illegality, fraud or violence, would have been prohibited by Section 4. Hence, the procedural requirements of Section 7 were simply inapplicable.

Any other construction would read Section 7 as setting forth procedural requirements which are nonsensical. It simply does not make sense to require that in order to obtain performance of the duty to bargain, as in the *Virginian Railway* case, to obtain relief from racial discrimination as in *Graham*, or to obtain performance of an agreement to arbitrate, as here, the plaintiffs should prove that police officers are unable or unwilling to provide protection for their property. Nor would it make sense to require an employer to offer such proof as a prerequisite to his obtaining similar relief against a union. The requirement makes sense where it was obviously intended to apply—to cases in which relief is sought which would be prohibited by Section 4 except for allegations of unlawfulness, fraud or violence.

What we urge, then, is not an *ad hoc* exemption from the

provisions of Section 7 for cases in which specific performance of an arbitration provision is requested, as stated by petitioners in the *General Electric* case, No. 276. We urge, rather, a reading of Section 7 which makes sense of the section in relation to the other sections of the Act, which is consistent with the prior decisions of this Court and of the Courts of Appeals, and which avoids the ludicrous result of using an Act which, in Section 8, expressly conditions the grant of equitable relief upon utilization of arbitration, where applicable, as a method of avoiding the use of arbitration.

## IV—THE COMMON LAW RULE AGAINST SPECIFIC PERFORMANCE OF AN AGREEMENT TO ARBITRATE SHOULD NOT BE APPLIED HERE.

### A—*Introduction*

In our argument so far we have deliberately attempted to isolate and dispose of the relatively simple issues and thus set the stage for examination of what has been the principal difficulty in this field. We have so far established, we believe, that the district court had jurisdiction over this suit, that it had power to grant appropriate equitable relief, and that nothing in the Norris-LaGuardia Act prevented it from granting that relief.

If these propositions are correct, it would follow that a union, in a suit in a Federal District Court, could obtain specific performance by an employer of his agreement with the union to, let us say, supply seniority lists or wage information, assuming that it could show, in accordance with traditional equity requirements, that such relief was proper. An employer similarly situated could obtain similar relief. To push our conclusions one step further, a union which claimed that an employer had refused to process grievances through the lower steps of a typical grievance procedure, providing for conferences with union officials and answers

within specific time limits, could maintain an action for specific performance of the agreement.

The question remains whether these conclusions are sufficient to supply the answer in the case in which the employer does process grievances but balks at the last step—arbitration. In this view, this final question is not one of establishing affirmatively that there is some law which authorizes the granting of specific performance of an agreement to arbitrate. It is, rather, a question of whether the common law rule as to the non-enforceability of agreements to arbitrate prevents the issuance of relief which could otherwise follow as a matter of course.

Before answering that question, however, it may be thought that we should enquire as to the basis upon which the answer is to be given. Is this question a question of substance or a question of procedure? If it is a question of substance, does state law or does federal law govern in a suit brought under Section 301(a)?

We do not propose to answer these questions in general terms. One of the difficulties which we believe may have led to the unfortunate disparity of opinion in the *Westinghouse* case was the attempt of counsel for the Union in that case to argue the abstract questions of whether Section 301(a) was procedural or substantive and whether state or federal law was to be applied in 301 actions. The question of what is substance and what is procedure, as this Court has itself noted, is a tricky one: The answer depends upon the purpose for which the question is asked, since there are no absolute categories which exist apart from the particular matrix in which the question occurs. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945).

The same thing is true, we believe, in deciding whether state or federal law should govern in an action brought under Section 301. Here, too, we believe that there are no absolute categories. The answer to the question may, to be sure, phrased in abstract conceptual terms. But it rep-

resents merely a generalization from the specific kinds of questions which the person giving the answer has in mind.

The correct approach, we believe, is to decide each case as it comes along. This approach, we think, will solve most of the problems which so vexed some members of the court in the *Westinghouse* case. For we believe that in almost every case in which a question arises in a suit brought under Section 301, the determinants of the answer to be given, whether state or federal, will be clearly apparent from the nature of the particular question which is asked.

It is our position, therefore, that this court should decide only what it is asked to decide in this case, that is, whether in a suit brought under Section 301(a) the federal courts will specifically enforce an executory agreement to arbitrate. As to that particular question we have no hesitancy in urging that the question is a federal one and that it should be decided in accordance with federal law derived so as to give a cohesive consistency to the entire pattern of federal legislation with respect to labor relations. Whether this is called a question of substance or a question of procedure we think wholly immaterial. The important consideration, we urge, is that the federal statutes which govern the relationships between this union and this employer require the conclusion that the kind of relief which is being asked for in this case should be granted. What this imports for other cases in which other kinds of questions are presented seems to us to be best left to those other cases.

On this basis, then, we turn to examination of the claimed impediment to the granting of specific performance in this case—the common law doctrine that this remedy will not be granted if the agreement to be performed is an agreement to arbitrate.

The most frequently cited restatement of the common law doctrine is Mr. Justice Brandeis' opinion in *Red Cross*

*Line* v. *Atlantic Fruit Co.*, 264 U.S. 109. As stated by Mr. Justice Brandeis:

> "The Federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance or to stay proceedings on the original cause of action. They have not given effect to the executory agreement as a plea in bar, except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity. And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process." 264 U.S. at 120-122(1924) (citations and footnotes omitted.)

Alabama law is apparently in accord, except that by statute executory agreements to arbitrate existing disputes may be enforced, although not agreements to arbitrate disputes which may arise in the future. See the cases cited in the opinions of Judge Jones (R. 46) and Judge Brown (R. 57).

We cannot, of course, argue that no such rule exists, although the Court below seems to have overlooked that the *Red Cross Line* case actually held that New York could con-

stitutionally change that rule with respect to admiralty cases heard in its own courts and that, in upholding New York's action, the Court noted that it had "no occasion to consider whether the unwillingness of the Federal Courts to give full effect to executory agreements for arbitration can be justified"[8] thus expressing at least inferentially the opinion that there was considerable doubt as to the propriety of continuing to abide by the rule.

Nor will we argue that the rule should be judicially reversed. It will be our purpose, rather, to argue that arbitration of the kind involved in all three of the cases now before the Court is simply not the same animal as that which the traditional rule governs. Its nature and its purposes are so different from the kind of arbitration which the Court discussed in *Red Cross Line* that, were it not for the unfortunate identity of names, there would not be the slightest doubt that the traditional rule is simply inapplicable.

B.—***The basis of the common-law rule of non-enforceability.***

Many arguments have been offered both in support and in condemnation of the common law rule against the specific enforceability of agreements to arbitrate. The most quoted condemnation was that of Lord Campbell in *Scott* v. *Avery*, 25 L.J. [N.S., Ex.] 308, 313, who ascribed the traditional rule to the fact that the pay of judges depended mainly, or almost entirely, upon fees and that the judges were opposed, for that reason, to anything that would deprive them of jurisdiction, and hence of compensation.[9] As Judge Hough said in 1915, "A more unworthy genesis cannot be imagined." *U.S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1007.

On the other hand, supporters of the common law rule have argued that this was not in fact the genesis of the rule

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[8] 264 U.S. at 125

[9] Lord Campbell's opinion as reported in 5 H. L. Cases 811, 3 Eng. Rep. 1021, is much less explicit.

and that the objection was not to the use of "these peaceable and domestic tribunals," [10] but was simply a reluctance by the courts to hold parties to agreements which would have the effect of adjudicating their rights without protections provided in a court of law. As Mr. Justice Story said in a passage quoted by Judge Brandeis in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. at 121:

> "Courts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy. On the contrary, they have and can have no just objection to these domestic forums, and will enforce and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question. But when they are asked to proceed further and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs."

There have been persuasive arguments on both sides of the question. See particularly the dissenting opinion in *Park Construction Co.* v. *Independent School District*, 209 Minn. 182, 296 NW 475 (1941). Remnants of the controversy still remain, even in the face of statutes explicitly reversing the common law rule. Where the courts believe, as this Court did in *Wilko* v. *Swan*, 346 U.S. 427 (1953) that there are special statutory protections for one party to a contract which may not be given full effect if the controversy is finally decided in a non-judicial forum they will not enforce the agreement to arbitrate.

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[10] 3 Blackstone, Commentaries, *15-17.

We do not propose to enter into the ancient controversy about the enforceability of agreements to arbitrate because we think that the controversy is wholly irrelevant. We refer to it briefly only to show that both sides of the controversy have held to one common and central assumption, an assumption which is correct with respect to the kind of arbitration they were discussing but which is simply not applicable to arbitration under a collective agreement. That assumption is that arbitration is a method of providing a "domestic forum," in Mr. Justice Story's words, as a substitute for the "common courts of justice." Whether the refusal to specifically enforce an agreement to arbitrate was a product of judicial jealousy or was an attempt to protect litigants from final adjudications in tribunals not providing the procedural protections afforded by the courts the common assumption was that arbitration was a substitute for litigation. In the words of the Second Circuit, "Arbitration is merely a form of trial . . . in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under the Federal Rules of Civil Procedure . . ." *Murray Oil Products Co.* v. *Mitsui and Co.*, 146 F. 2d 381, 383 (1944).[11]

Both the majority and the dissenting opinions in *Wilko* v.

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[11] That this was the basis upon which the common law rule rested is made particularly clear when it is recognized that, under the common law rule, an arbitration award once entered was enforceable substantially as if it were a judgment rendered by a judicial tribunal. As the Court of Appeals of New York said in 1854:

> "There is, or ought to be, no difference in the effect of an adjudication, as a bar to a subsequent suit, for the same cause, whether it is pronounced by judges selected by the parties or appointed by the State. In either case, every consideration of public policy requires that after the parties have been fully and fairly heard, further litigation as to the same subject matter should cease and no satisfactory reason can be assigned why a judgment, as an act by the law, should not estop the parties, and an award, which is another name for a judgment, which the parties have expressly stipulated should be final as to the subject submitted, should not be equally conclusive." *Brazil* v. *Isham*, 12 N.Y. 9.

*Swan,* 346 U.S. 427 (1953), exemplify this conception of the role of arbitration. In the words of Mr. Justice Reed, for the Court, at p. 438:

> "Congress [by the Arbitration Act] has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical, and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment."

Or, in the words of Mr. Justice Frankfurter, dissenting, arbitration has "the advantages of providing a speedier, more economical, and more effective enforcement of rights . . . than can be had by the tortuous course of litigation. 346 U.S. at 439-440. The difference between the opinions was a difference between the relative weight which should be given to statutory protection offered by the Securities and Exchange Act, on the one hand, and the Congressional recognition of the parties' voluntary designation of a non-judicial tribunal on the other. Both sides recognized that the agreement to arbitrate was an agreement to provide a substitute for litigation.

C.—***The inapplicability of the common law rule to arbitration under collective agreements.***

"One of the most treacherous tendencies in legal reasoning is the transfer of doctrines, which are, in effect, generalizations developed for one set of situations to seemingly analogous yet essentially very different situations." [12]

It should be plain that to apply the generalizations developed for the kind of arbitration discussed above to arbitration under collective agreements such as we have in these cases would be to follow just such a treacherous tendency. Arbitration in labor disputes is not the same thing as commercial arbitration. Its development was different, its pur-

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[12] Dissenting opinion of Mr. Justice Frankfurter in *Braniff Airways, Inc.* v. *Nebraska State Board,* 347 U.S. 590, 603 (1954).

poses are different, its forms are different, and its consequences are different.

Unlike commercial arbitration, which has its origins in antiquity,[13] labor arbitration is a modern phenomenon. Prior to 1900, "arbitration" in labor matters did not even necessarily involve the use of impartial third parties; the term included what is now called collective bargaining and was applied to all settlements of labor disputes by conference committees of the parties, whether or not outsiders were involved. It was in this all-inclusive sense that the National Labor Union in the 1860's and the Knights of Labor in the 1870's called for the arbitration of all labor disputes.[14]

Labor arbitration, in the sense in which we use the term today, had its beginnings shortly after the Civil War.[15] But there were few cases before the turn of the century. And only in the last twenty years has it become a familiar phenomenon.[16]

Most of the earliest labor arbitrations were what we would today call "contract arbitrations"—that is, they involved the question of what the terms and conditions of employment should be. Today, on the other hand, most

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[13] Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. of Pa. L. Rev. 132 (1934); Sayre, *Development of Commercial Arbitration Law*, 37 Yale L. J. 595 (1928).

[14] The National Labor Union at its convention of 1866 called for "the appointment . . . of an arbitration committee to whom shall be referred all matters of dispute between employers and employees." The preamble of the Knights' constitution called for "the substitution of arbitration for strikes, whenever and wherever employers and employees are willing to meet on equitable terms." 2 Commons, History of Labour in the United States (1918) 98, 336. The early history is summarized in Witte, Historical Survey of Labor Arbitration (U. of Pa. Labor Relations Series, 1952).

[15] Professor Witte dates the first American labor arbitration as April 19, 1871. Witte, *op. cit. supra* note 13, p. 11. Others give different dates. See Braden, *Arbitration and Arbitration Provisions* in N. Y. University, Second Annual Conference on Labor (1949) p. 355.

[16] Witte, *op. cit.*, p. 3.

labor arbitrations are "grievance arbitrations," the arbitration of disputed questions of interpretation and application of existing labor agreements. Although the two have much in common, and both are in a sense a part of the collective bargaining process which the earlier usage also called "arbitration," the distinction between "grievance arbitration" and contract arbitration" must clearly be kept in mind. Materials discussing "industrial arbitration" or "labor dispute arbitration," particularly if they are more than fifteen or twenty years old, usually refer to contract arbitration—the policy of settling differences as to what a collective agreement shall be by reference to a third party. They have little meaning with respect to the cases now before the Court, which involve grievance arbitration growing out of the more modern but today almost universal practice of establishing the terms and conditions of employment by a contract having a fixed term, with a provision for the settlement of disputes as to the interpretation and application of that agreement by arbitration.

Grievance arbitration has a resemblance to commercial arbitration in the sense that it arises out of an existing agreement, not a contract to make an agreement. But there is one significant difference which basically distinguishes it from commercial arbitration. Labor arbitration—whether contract or grievance arbitration—fulfills one vital function: the substitution of the judgment of a third party for the use of economic force. It is not a substitute for litigation. It is not a device by which the parties agree to accept a perhaps less precise adjudication of their legal rights in order to avoid the complications and expense of litigation. It is, rather, a device by which the parties agree to accept the judgment of a third party instead of fighting the issue out on the picket lines.

That this is the function of contract arbitration is, of course, clear. Such arbitrations are usually agreed upon an individual case basis to avoid or to settle particular

disputes and are especially familiar in public utilities or other industries seriously affecting the public interest.

Grievance arbitration is in this respect the same, although perhaps less clearly, as contract arbitration. Some labor agreements contain neither a no-strike clause nor an arbitration provision. Under these agreements disputes over its application and interpretation are settled either by negotiation or by a strike. Such agreements are today relatively infrequent. The Bureau of National Affairs reported a private survey in 1956 which showed that 91% of the agreements surveyed provided for arbitration of some kind and 89% contained some variety of no-strike clauses.[17] Sometimes, as in the *Westinghouse* case, arbitration of disputes over the application or interpretation of the agreement is provided for—but only if mutually agreed to in the particular case. Otherwise the union reserves the right to strike if the grievance is not settled through the grievance procedure.[18] In still other contracts, all disputes are made arbitrable except specific categories. Thus in the agreements in the automobile industry disputes over production standards and incentive rates are usually not arbitrable; but are specifically exempted from the no-strike clause.[19] Finally, in many agreements, such as those in the basic steel industry, there is an unconditional no-strike clause and an agreement that all unresolved disputes as to the interpretation and application of the agreement shall be settled by arbitration.[20]

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[17] Collective Bargaining Negotiations and Contracts (hereinafter cited as CBNC) 51:7, 77:1.

[18] Record, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, No. 51, October Term, 1954, pp. 32, 35.

[19] CBNC 77: 103.

[20] In 1952 the public members of the Wage Stabilization Board recommended, as a solution to the inability of United States Steel and the United Steelworkers of America to agree on the standards to be used to test the fairness of new incentive plans, that in such

Whatever the formula in the individual labor agreement, the same pattern appears. The agreement to arbitrate grievances is the concomitant of the agreement not to strike; the arbitration process is the substitute for the strike and the picket line in settling questions of application of the agreement.[21] It differs from contract arbitration in that it is the parties' method of implementing their desire to keep the agreement in force during its term, rather than a method of making an agreement. It is similar in the sense that in both cases the alternative is a strike.

Conceptions of the manner in which grievance arbitration should be conducted vary. Some of the most learned practitioners in the field believe that the grievance arbitration process is essentially an extension of collective bargaining. Those who hold to this view emphasize the necessity of mutual acceptability of the arbitrator's decisions and reiterate that, unlike parties to a commercial contract, the parties to a collective agreement must continue to live with

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disputes the no-strike clause be waived. *Basic Steel Industry,* 18 LA 112, 130 (1952). The suggestion was not adopted and the agreement now provides that the arbitrator shall decide whether a new incentive provides "equitable incentive compensation." cf. CBNC, 93:454.

[21] We do not mean to say that there is a complete correspondence between the agreement not to strike and the agreement to arbitrate on every point in every labor agreement. Sometimes an agreement provides that "casual corrections and necessary routine changes" are not subject to the grievance and arbitration procedure. See CBNC 51:12. Such an agreement means in essence that the employer's action with respect to such matters is not to be regarded as limited by the agreement. In other cases, as in the present agreement, it is specifically provided that "general wage revisions" are not subject to arbitration (R. 17). See also CBNC 51:264. This simply expresses the parties' agreement that the general wage scale established by the agreement shall remain in effect during its term and prevents any contention that the agreement to arbitrate is to be construed as "contract arbitration" going beyond the settlement of grievances as to the meaning and application of the terms of the agreement.

each other and to operate together after the decision in an arbitration case has been made.[22]

There are those, on the other hand, who regard grievance arbitration as a much more judicial process in which the arbitrator is bound to follow the meaning of the contract between the parties without regard to its effect upon their future relationships and without much regard to the factor of mutual acceptability.[23]

This controversy, however, does not at all impinge upon the conclusion, with which all concur, that grievance arbitration is not a substitute for litigation but is, rather, a substitute for the settlement of disputes by the use of economic force. Indeed it emphasizes its truth. Those who adhere to the more judicial view of the arbitration process believe that a union, having made a contract, should be bound to live by that contract without interpolation or amendment by the arbitrator, for its term. Those who take the more flexible view of the arbitration process believe that in deciding what the application of that agreement should be to situations not envisaged by the parties more attention should be paid to their needs than to the literal wording of the agreement. But both accept as a fundamental characteristic of the grievance arbitration process that, unlike commercial arbitration, it is the agreed-upon substitute for economic conflict in the determination of the

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[22] The most prominent spokesman for this point of view has been Dr. George W. Taylor. See Taylor, *The Voluntary Arbitration of Labor Disputes,* in The Law and Labor-Management Relations (U. of Michigan, 1951). See also Simkin, *Acceptability as a Factor in Arbitration Under an Existing Agreement* (U. of Pennsylvania, 1952).

[23] See the comments on Doctor Taylor's paper in *The Law and Labor-Management Relations,* cited *supra* note 22 by Owen Fairweather at pp. 207, and also Fairweather and Shaw, *Mimimizing Disputes in Labor Contract Negotiations,* 12 Law and Contemporary Problems (1947) pp. 297, 316-317; Braden, *Arbitration and Arbitration Provisions,* cited *supra* note 15, p. 361.

method of handling particular situations which arise during the term of the collective agreement.

Even the American Arbitration Association which has been the leading organizational advicate of the so-called judicial approach to grievance arbitration has recognized that it is so different from commercial arbitration that different procedures and different standards must govern the two kinds of proceedings.[24]

As Jesse Friedin put it in summarizing the relationship between grievance arbitration and the courts:

> "It is of first importance that in dealing with arbitraton, whether legislatively or judicially, it should be recognized that this is not litigation in the conventional sense. Nor is it a substitute for litigation. It is a procedure specially designed to meet the need for a substitute for strike . . . . If this essential nature of labor arbitration is as deeply felt by lawmakers and judges as it is by the men who daily deal with grievances and the making of collective agreements, we shall have gone far toward clarifying the confusion between commercial and labor arbitration. The former may truly be considered a substitute for litigation and an intrusion upon the historic jurisdiction of courts. And justification there may be for more intense supervision of commercial awards. But the stuff and history of labor arbitration is wholly different.[25]

Every other informed student of the field agrees.[26]

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[24] American Arbitration Association: *Commercial Arbitration Rules*; American Arbitration Association, *Labor Arbitration Rules*. See Kellor, *American Arbitration*, (1948) pp. 83 ff.

[25] *Labor Arbitration and the Courts* (1952) p. 47.

[26] Dr. George W. Taylor: ". . . . arbitration, like the strike for which it is a substitute." *op. cit. supra* note 22 at p. 197; Simkin, *op. cit. supra* note 22; Lapp, *Labor Arbitration* (National Foreman's Institute 1942) pp. 4, 8, 9; Braden, *Arbitration and Arbitration Provisions*, cited *supra* note 15, p. 375; Fairweather and Shaw, *op. cit. supra* note 23, at p. 318.

Fortunately in the present case the collective agreement makes explicit what is sometimes merely implicit in labor agreements: the necessary connection between the agreement to arbitrate grievances and the agreement that there shall be no strikes. Both questions are dealt with in the same article, which is entitled: "Strikes and Lockouts—Arbitration." (R. 15) The Article begins by stating that the employer and the union agree that the procedures provided in the article are adequate to provide a fair and final determination of all grievances and that therefore they both agree that strikes and work stoppages should be avoided. This is further implemented by the specific grant of authority to the employer to discharge employees who engage in work stoppages or slowdowns during the term of the agreement "as a result of the failure of an employee to exhaust all grievance procedures available under the contract." And Union action to prevent and secure the termination of strikes is specified in cases in which they occur over grievances which are "arbitrable under the contract."

The nature of the agreement to arbitrate in a labor contract as a substitute for the right to strike, rather than as a substitute for litigation, is further emphasized by the nature of the grievances here sought to be arbitrated. These are not grievances which would normally be settled by resort to a court of law. They involve the question of whether the Company was justified in increasing work loads and reducing the number of employees assigned to complete given tasks. The parties agreed that this kind of question should be determined on the "basis of sound engineering principles and practices" and that the rate to be paid for the

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That grievance arbitration is something more than a substitute for the right to strike and is, or should be, an integral and continuing part of a system of industrial self-government, as Harry Shulman correctly argued (Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955)) does not detract from but adds to the conclusion that it is something very different from commercial arbitration.

work shall be "based on the full use of an employee's time during his work day, working at the normal pace of an average qualified employee with adequate allowance for fatigue and personal needs." (R. 11)[27] They further agreed that in any arbitration on such question the arbitrators shall be a "qualified textile technicians" or other similarly qualified persons.

This is grievance arbitration, to be sure. But the standards are extremely general in nature. Necessarily so. No labor agreement can specify in details what each employees work load shall be. Nor will employers generally willingly agree, and understandably, to specify simply that there shall be no changes in work loads during the term of the agreement. Equally, no union which does not abandon its function of protecting its members can agree to permit unilateral changes in work loads during the term of an agreement without some form of control. Two avenues of limitation are possible: 1) the right to strike to protest against changes in work loads (as in the automobile industry) or 2) an agreement to arbitrate under general principles of equity and fairness.

The parties here chose the second route. It simply does not make sense to treat that expression of choice as equivalent to the traditional agreement to arbitrate questions of damages or performance or non-performance of a commercial contract. Nor should the judicial determination of the remedy to be afforded when one party or the other fails to perform such an agreement be regarded as governed by the self-imposed limitations developed by the courts with respect to commercial arbitration agreements. The two are just different.

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[27] The text of paragraphs A and B of Article V was unfortunately garbled in the printing of the record. We attach, as Appendix B to this brief, the correct text, as it appeared in the printed collective agreement annexed as Exhibit A to the complaint in the District Court.

It is permissible to argue, although not in this forum, that collective agreements are so different from commercial contracts that legal enforceability by actions in the courts is undesirable, on whichever side the breach may occur. See Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999 (1955). Much of the American labor movement has traditionally taken that view and we are inclined to agree with it.[28] But Congress has settled that argument, at least for the present, by the Taft-Hartley Act, and particularly by Section 301 (a). To that section we now turn.

## V—SECTION 301 (a) IS A SUFFICIENT BASIS UPON WHICH TO HOLD THAT A FEDERAL DISTRICT COURT CAN SPECIFICALLY ENFORCE THE AGREEMENT TO ARBITRATE.

What has been said above leads to two possible conclusions. On the one hand, we have urged in Parts I-III above that the District Court had jurisdiction over the case, that it had the power to grant equitable relief if appropriate and that nothing in the Norris-La Guardia Act prevented it from exercising that power. If it is also true, as we argued in Part IV, that the common law rule against the specific enforcement of executory agreements to arbitrate is not properly applicable to collective agreements, then there is no bar to the relief requested here. The Federal courts by virtue of their inherent powers as courts of equity can give that relief, as they would with respect to any other agreement in a case over which they have jurisdiction.

This was the view of Judge Brown, dissenting, in the court below. We need not repeat here his persuasive arguments in support of that view. Certainly if recourse is had to the whole complex of Federal labor legislation to establish the climate in which the federal courts are to exercise

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[28] See Hearings Before the Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., Part 1, p. 478 (1949).

their jurisdiction, this result seems to be required. Section 201 of the Labor Management Relations Act, 1947, states it to be the policy of the United States that "sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation . . . . can most satisfactorily be secured" by the settlement of issues through collective bargaining and that, to that end voluntary arbitratoin should be encouraged "to reach and maintain" collective agreements, "by such methods as may be provided for in any applicable agreement for the settlement of disputes." The Federal Mediation and Conciliation Service which is established by the Act, is specifically directed to assist parties to that end. 29 U.S.C. § 171. Section 203(d) of the Act establishes as the desirable method for settlement of grievance disputes under existing collective bargaining agreements the method agreed upon by the parties in such agreements. 29 U.S.C. § 173(d). And to these evidences of congressional policy must be added the earlier provisions of Section 8 of the Norris-La Guardia Act which makes the issuance of injunctive relief in labor dispute cases dependent upon the exhaustion of applicable arbitration procedures.

Judge Brown's view, however, does not give full weight to the considerations which we set forth in Part IV above. If we are correct that arbitration under collective agreements is a substitute for the strike, rather than for litigation, we have established more than the inapplicability of the common law rule against specific enforcement of such agreements. We have also established affirmatively a basis upon which a Federal Court should enforce the promise to arbitrate in a suit brought under Section 301(a). For, if we are correct, arbitration is not merely a matter of procedure, an alternative method of establishing legal rights which could be pressed in litigation in the absence of such an agreement. To the contrary, the agreement to arbitrate goes to the whole substance of the collective agreement. Particularly is this so in this case, where the dispute centers

on work loads and the contractual principles which govern the arbitration consist only of a restatement of the broadest of general principles. The agreement to arbitrate is, in essence, an agreement to abide by, as if written into the contract, rules for specific cases as determined by the arbitrator.

Arbitration, in this sense, is not only not a substitute for a litigation: the agreement to arbitrate is the consideration for and part and parcel of the agreement not to strike.

If this is so, Section 301(a) has particular significance. The section, it is true, is phrased simply as a jurisdictional provision. And it is also true that nothing in its legislative history indicates that Congress at any time focused on the problem of enforcement of agreements to arbitrate.

But Congress did focus upon the agreement not to strike. Indeed there can be little doubt that the sponsors of the legislation had particularly in mind one specific case: a breach by a union of an agreement not to strike during the term of a collective bargaining agreement.

As the Senate Committee put it:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
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> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S. Rep. No. 105 on S. 1126, 80th

Cong., 1st Sess., p. 16. See also H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 297, 337.

The problem in this case, as Congress saw it, was that unions, as unincorporated associations, could not be reached by suits in most state courts. It was necessary, therefore, to provide that unions could be sued as entities in the Federal courts. This was the omission from the Case bill as it passed the House in the 79th Congress which, as Mr. Justice Frankfurter's opinion in the *Westinghouse* case points out, Senator Taft had found objectionable.[29] This was done in Section 301(b).

But it was also necessary to establish a Federal cause of action so that this procedural rule could be applied. As the Senate Committee report noted, after discussing the procedural difficulty,

> "There are no Federal laws giving either an employer or even the Government itself any right of action against a union for any breach of contract. Thus there is no 'substantive right' to enforce, in order to make the union suable as such in Federal courts." *Op. cit.*, p. 17.

It was to meet this objective—which had been encompassed by the Case bill—that Section 301(a) was contained in the bill.

If we concede, as we must, that the principal target which the sponsors of Sections 301(a) and 301(b) thought their double-barrelled shotgun would reach would be unions which breached their no-strike agreements, we do *not* concede that Congress intended to pass a statute allowing only suits against unions. To the contrary, we think it is clear that no such legislation could have passed even the 80th Congress, and we doubt that Senator Taft himself would have sponsored any such proposal.

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[29] See the history referred to by Mr. Justice Frankfurter, 348 U.S. at 445-446.

Senator Taft and the other sponsors of Section 301 did believe that unions were the chief if not the only non-performers of promises in collective agreements. Unions were the villains whom they thought would be the defendants if the Federal courts were given jurisdiction over breaches of such agreements. But no one proposed, and Congress did not enact, a statute giving relief only against unions for breach of a no strike-arbitration provision. To the contrary, all of the argument in favor of the enactment of Section 301 was explicitly premised on the objective of making, as the Senate Committee put it, "collective-bargaining contracts equally binding and enforceable on both parties." [30] Or, as the House Committee said, the section would make both parties "equally responsible . . . for contract violations and provides for suit by either in the United States District Courts." [31]

The objective was clearly stated in the Senate Committee report:

> "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."

If this was the Congressional purpose, then the answer to the question in this case must immediately be clear. Without arguing whether, *in general,* Section 301(a) is substantive or procedural or whether, *in general,* Federal or State law is applicable to such agreements, one particular conclusion is inevitable: the agreement to arbitrate which is the indispensable *quid pro quo* for the agreement not to strike must be enforceable in the Federal courts in a Section 301 suit. To come to any other conclusion would be to convert the equality of responsibility which Congress said it was

[30] S. Rep. No. 105, 80th Cong., 1st Sess., p. 15.
[31] H. Rep. No. 245, 80th Cong., 1st Sess., p. 6.

providing for in Section 301(a) into a snare and a delusion. To hold that an employer can recover damages in the Federal courts if a union violates its promise not to strike but that the union cannot compel performance of the method of enforcing the standards provided in the collective agreement which the union has accepted in lieu of the right to strike would be to convert an instrument which Congress said was designed to promote industrial peace into an instrument of unilateral industrial warfare.

Section 301(a) must be read, therefore, in the light of its legislative history and objectives, as having been designed to prevent strikes and to promote industrial peace by making enforceable in the Federal Courts the reciprocal promises of both unions and employer that there shall be no strikes but that all disputes as to the meaning and application of their agreement shall be resolved through the grievance and arbitration procedure.

The fact that Congress did not advert to the enforcement of agreements to arbitrate is immaterial. Congress did not in fact advert to *any* specific case in which an employer refused to perform a collective agreement. Looking only at the instances in which unions violated such agreements, Congress said that *both* parties should be able to sue. Looking only at instances in which unions violated the reciprocal no-strike-arbitration provisions, Congress said that *both* parties should have a remedy. The legislative history, under such circumstances, necessarily does not show specific consideration of what the courts should do when unions availed themselves of the statutory grant. But the courts, in enforcing the counterbalance which Congress provided in general terms without discussion of any specific application, can and should provide the counter-balancing remedy necessary to make collective agreements, as the Senate Committee said, "valid, binding and enforceable."

Nor is it material that both the Senate and the House, focusing again only on union failure to abide by the agree-

ment to arbitrate and not strike, considered providing enforcement mechanism through unfair labor proceedings before the National Labor Relations Board [32] but eventually decided to leave such enforcement "to the usual processes of law." [33] The choice here was a choice of forum not a choice of remedy. The National Labor Relations Board was regarded as the appropriate instrument to enforce the duty to bargain collectively, the courts the appropriate instrument to enforce the collective agreements bargained for.

In this case, the Company increased work loads and reduced employees in April and May of 1954. The union did not call a strike and the employees continued to work, in compliance with the collective agreement, for a four-week trial period. They then filed grievances. The Union sought the decision, for which it had bargained in return for the no-strike clause, as to whether or not the Company's changes were proper. Section 301(a) should be read, we believe, as authorizing the Federal courts to grant them that relief.

## VI—THERE ARE NO SERIOUS PRACTICAL OBJECTIONS TO RELIANCE ON SECTION 301(a) ALONE AS AUTHORIZING SPECIFIC PERFORMANCE.

In the *General Electric* case, the First Circuit, by Judge Magruder, said that the history of the "hoary though probably mis-guided judge-made reluctance to give full effect to arbitration agreements" convinced it that specific performance of such agreements could not be granted without an explicit statutory basis. That history, as we have argued above, was concerned with arbitration as a substitute for

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[32] H. Rep. No. 245 on H.R. 3020; 80th Cong., 1st Sess., pp. 19-21 (1947); S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 20, 23 (1947).

[33] H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 42 (1947).

litigation, not grievance arbitration, and hence should not be regarded as binding.

In addition, Judge Magruder said, "practical grounds support this conclusion." Those practical grounds he listed as the absence of the procedural safeguards and specifications contained in a typical arbitration statute. And those same grounds, he found, militated against reliance on Section 301(a) as the basis for enforcing the agreement to arbitrate.

The answer to these practical objections is the same as the answer to reliance on the hoary judicial precedents—they may make sense as applied to commercial arbitration but not as applied to grievance arbitration.

Some problems are, of course, the same. Thus the failure of the parties to specify an arbitrator needs to be remedied whatever kind of arbitration be involved. But this is not a difficult problem. There is no more need for specific statutory authority to appoint an arbitrator, where the parties are unable to agree, than there is for specific statutory authority to name a substitute trustee or successor trustee in ordinary equity practice. Furthermore, the problem is a rare one, since labor agreements commonly specify, as the agreement in this case does, a method for selection of an arbitrator, through the American Arbitration Association or the Federal Mediation and Conciliation Service,[34] if the parties cannot agree.

Most of the other provisions in a typical arbitration statute are responsive to a problem not present in grievance arbitrations: the necessity of specifying procedures which will give the arbitrators' award the force of that for which it is to be substituted—the judgment of a court of law. Thus a typical arbitration statute provides for a summary pro-

[34] The Arbitration Association, which more closely analogizes labor cases to commercial cases, since it handles both but under different procedures, will not appoint an arbitrator where one party refuses to participate in the selection process. The Federal Mediation and Conciliation Service will. See its Second Annual Report (1949) p. 38.

cedure, by motion, for confirmation of an award. It provides for modification or correction of the award, again by motion, where there is "an evident material miscalculation of figures." It provides for vacation of the award by motion if it is not "final and definite," or if the arbitrator refused to hear "pertinent and material evidence," and it provides that an order entered on an award shall have the same effect as a judgement in an action.

Procedurally such statutes provide for subpoenas and witness fees, and—in the United States Arbitration Act—for libel and seizure of a vessel by a District Court, if the arbitration involves a matter justiciable in admiralty, as a basis for beginning the arbitration.

All of the procedural specifications are necessary if arbitration is regarded as a substitute for litigation. They, in effect, treat the arbitration process as having the same stature and therefore being subject to the same procedural limitations and requirements as a proceeding in court. They are completely foreign to the course of grievance arbitration. And they are unnecessary because what the parties want in a grievance arbitration, and the reason they provide for arbitration, is not the procurement of a judgment at law as to the liability of one party or the other to pay damages for breach of a contract to buy or sell goods, or to charter a vessel. What they want is a determination of the meaning of the general standards they have provided for in the collective agreement as they apply to the particular case. Is the work load assigned to a particular job too high? Does a particular incentive yield equitable compensation? Was a discharge for just cause? What they get is not primarily a judgment for damages—although sometimes back pay or damages may follow as an incident to the determination they seek—but a specification of the meaning of their continuing agreement as it applies to a particular case. The procedural requirements of a typical arbitration statute are largely irrelevant for this kind of a proceeding. In some

cases they provide a useful analogy, as Judge Wyzanski held in *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953). But their absence creates no practical problems which should bar a simple injunctive order directing the parties to proceed as they have agreed to proceed.

## VII—THE CONSTITUTIONAL AND FORUM-SHOPPING PROBLEMS ARE NO GREATER HERE THAN WHEN A UNION IS SUED FOR BREACH OF A NO-STRIKE ARBITRATION PROVISION.

No party in any of the three cases now before this Court dealing with the enforcement of agreements to arbitrate grievances has suggested, as far as we know, that any constitutional problem exists. In view of the *Westinghouse* case, however, it may not be wise to omit discussion of this question, although in our view the discussion need not be extensive.

We wish to assert only two propositions. First, we think that the logical consequence of our view of the grievance arbitration process and the application of Section 301(a) to it is that no possible constitutional problem exists. Congress had said, as a substantive matter, that both unions and employers are obliged to bargain in good faith with each other with respect to a no-strike - arbitration clause. It has established, as the federal labor policy, that such agreements when entered into should be performed in order to preserve industrial peace. And, to that end, it has authorized the bringing of suits for breach of such agreements in the Federal courts.[35] We think that there would be little constitutional question if Congress had specifically said: where an agreement affecting commerce provides that there

[35] ". . . to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (1947), p. 16.

shall be no strikes but all disputes arising during its term as to its meaning and application shall be settled through the grievance and arbitration procedure specified in the agreement, the Federal District Courts shall have jurisdiction to direct specific performance of the agreement to arbitrate and to award damages to any employer who may suffer loss because of violation of such provision. In our view this is the effect of the statute which Congress did pass as it applies here. Hence, we see no constitutional problem.

Our second proposition is that there can be no constitutional question here which is any more serious than would be presented in a case in which an employer sued for damages for breach of a no-strike - arbitration clause. In such a suit there could be no question of statutory construction, since Congress specifically adverted to this example of the intended operation of Section 301(a). The constitutional issue, if there is one, would therefore have to be decided one way or the other.

It happens, however, that suits by unions are the first to be heard by this Court under Section 301(a). The application of the statute in such cases is less clear because Congress did not advert to any specific examples of the intended operation of its authorization for suits by unions. If the Court should use this uncertainty to whittle away at the right of unions to sue, in order to avoid a constitutional question and then in an employer suit hold the statute constitutional, the effect will be to make the meaning of the statute depend upon the accidental sequence of litigation. In order to avoid a constitutional question which, in the end, will have to be met, the Court will have distorted the expressed intention of Congress to balance the rights of employers and unions.

Section 301(a) has been, of course, applied against unions. A recent example is *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F. 2d 576 (1st Cir., 1956), in which a judgment of $359,000 was affirmed by

the First Circuit over a constitutional objection by the union. A petition for certiorari was filed. No. 176, October Term, 1956. The case was settled, however, and the petition dismissed pursuant to stipulation. If the *Mead* case had been decided by this Court there could be no constitutional problem here—the statute is either constitutional both ways or unconstitutional both ways. Constitutional doubts which would exist equally in the *Mead* case and in this case should not be used to construe away union remedies here because the *Mead* case was settled.

The same considerations apply to the forum-shopping considerations and federal-state problems mentioned in Justice Frankfurter's opinion in the *Westinghouse* case. All are equally applicable to suits which Congress clearly intended employers to be able to bring in the Federal courts. These considerations may argue, and persuasively, against the enactment of Section 301(a). Indeed the minority reports in both Senate and House set them forth quite clearly.[36] But Section 301(a) was enacted nevertheless. If there is to be shopping, the market should be open—as Congress said it should be open—to both employers and unions.

## VIII—IF OUR ARGUMENT AGAINST APPLICATION OF THE COMMON LAW RULE IS INCORRECT, THEN THE UNITED STATES ARBITRATION ACT SHOULD BE HELD TO APPLY IN ACCORDANCE WITH THE OPINION OF THE FIRST CIRCUIT.

The burden of our argument so far has been that grievance arbitration of the kind here involved is so different from the commercial arbitration dealt with by the common law precedents that the District Court was free, even without

[36] House (Minority) Report No. 245 on H. R. 3020, 80th Cong., 1st Sess. (1947) pp. 109-110; S. Rep. No. 105, Part 2 (Minority Views), on S. 1126, 80th Cong., 1st Sess. (1947), p. 14.

explicit statutory provision, to grant the relief requested. We have further argued that if any fair meaning is to be given to Section 301(a) it must be construed as permitting the Federal Courts to protect both the employer and and the union interests in the reciprocal no-strike - arbitration provisions of a collective agreement. The employer's interest is protected by a suit to recover the financial damages which he may suffer as a result of a violation of such a provision; the union's interest can only be protected by specific performance of the agreement to arbitrate.

The necessary premise of this argument has been the distinction between commercial arbitration and grievance arbitration. If we are wrong that this distinction supplies the method for enforcing the equal responsibilities which Congress said it intended to enforce by virtue of Section 301(a), then it follows, for the same basic reason, that the United States Arbitration Act, in conjunction with Section 301(a), should be construed as authorizing the relief here sought.

That Act was intended to abolish in the Federal courts the common law rule against the enforcement of agreements to arbitrate. We have argued that the common law rule was only properly applicable to commercial arbitration and should not be applied to grievance arbitration. If we are wrong on that, then clearly the statute abolishing the common law must be read as applying to grievance arbitration as well as commercial arbitration. Any other result would leave grievance arbitration, which was unknown at common law and to which the rationale of the common law rule is plainly inapplicable, the only surviving victim of a rule which no longer exists in the area of its proper applicability. This result, furthermore, would come about at a time when Congress has expressed its view in Section 301 of the Taft-Hartley Act that collective agreements should be treated, like commercial contracts, as legally enforceable obligations.

Such an incongruous result could of course be justified if there were unmistakeable evidence that Congress clearly intended it. But such evidence does not exist.

Since we believe, as must be obvious from the earlier portion of our argument, that the proper method of avoiding this unintended incongruity is to consider grievance arbitration wholly apart from commercial arbitration, we will not offer extended argument on the United States Arbitration Act, except as we think we can add to the treatment contained in Judge Magruder's opinion in the *General Electric case,* No. 276. We also respectfully refer the court to the thoughtful and persuasive treatment of the subject by Professor Archibald Cox in *Grievance Arbitration in the Federal Courts,* 67 Harv. L. Rev. 591 (1954).

***A—Grievance arbitration was virtually unknown at the time the Arbitration Act was passed.***

Before examining the particular portions of the Arbitration Act which seem to provide the greatest difficulty, we think one point is sufficiently important to deserve special emphasis. That point is that the process of applying the Arbitration Act is a process of fitting it to a phenomenon that was virtually unknown in 1925.

As we have already noted in Part IV, *supra,* "it was only in the nineteen-thirties that labor arbitration predominantly came to mean arbitration in grievance cases." [37] Prior to that time the principal form of labor arbitration was the settlement of labor disputes, in the sense of disputes as to what the terms of the wage bargain should be. The terms "labor arbitration" or "industrial arbitration" were used primarily to describe that kind of device. Grievance arbitration did develop out of the use of arbitration as a method of fixing piece rates in the clothing industries after the Protocol of Peace of 1910, but even there it was not until much later that this process became the interpretation and application

[37] Witte, Historical Survey of Labor Arbitration (1952) p. 49.

of agreed-upon standards contained in a contract rather than a method of settling a wage controversy. [38]

In dealing with the Arbitration Act, then, we cannot look to see whether Congress intended to cover or exclude grievance arbitration as we know it today. It could not have intended either. The question is whether the language which Congress wrote should be construed in the light of today's conditions and today's Congressional policy as including or excluding this new development.

B—*A collective agreement is not a contract of employment.*

Section 1 of the U. S. Arbitration Act exempts from its provisions "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." A collective agreement is plainly not a contract of employment. See *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 334-35 (1944). From the fact that the exclusion of contracts of employment was apparently inserted to overcome objections to the Arbitration Act by the International Seamen's Union of America, however, it has sometimes been assumed that the words "contract of employment" must have been used, perhaps inartistically, to refer to a collective agreement.

Such a conclusion overlooks the fact that seamen are peculiarly one of the few classes of workers that do actually sign individual contracts of employment: the traditional shipping articles which must be signed by every seaman. And, typically, at least in the early 20's, such individually signed contracts provided as follows:

> "It is further understood and agreed that any question whatsoever between Master, Consignee, Agent or Owner of the above named vessel, and any of the undersigned seamen or mariners shall be heard and de-

[38] *Id.* at 28-29, 48-49.

> cided by any Shipping Commissioner or Consul appointed under the authority of the laws of the United States, and that every award so made by him shall be binding upon parties, and shall in any legal proceeding which may be taken in the matter before any Court of Justice be deemed conclusive as to the rights of the parties as to such question or subject of dispute." [39]

In commenting on the clauses commonly being inserted in 1921 in shipping articles President Furuseth of the Seamen's Union found such arbitration provisions particularly objectionable:

> "The one provision found in nearly all of these insertions to the effect that the Shipping Commissioner shall act as arbitrator of any or all disputes and that such decision as he may make shall be final is intended to deprive the seaman of the right to appeal to the Courts. The Shipping Commissioners Act gives no such power to the Commissioner, unless there is a submission in writing and such submission is made after the dispute has arisen and not prior to entering into the agreement. It has no right in the articles. I have discussed this clause with the Commissioner of Navigation and he admitted that it is not strictly according to law; but if the men are not willing to sign such clause they need not. This is nothing short of inviting the men to strike to get the law enforced. If the seaman does this all the blame is heaped on him." [40]

With this background it is understandable that when, at about the same time, it was proposed to make agreements to arbitrate future disputes enforceable, the Seamen's Union should be concerned about the effect of such legislation on these individual contracts of employment.

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[39] Proceedings, Twenty-Fourth Annual Convention of the International Seamen's Union of America (1921) pp. 27-28.

[40] *Id.* at 28-29.

The union did oppose the legislation as it was originally drafted. At its 1923 convention it adopted a resolution dealing with the question. It was entitled "Compulsory Labor" and it said in part:

> "To use the necessities of men as in H.R. 13522, whether such necessities be individual or arising out of family relations, is especially reprehensible because it makes need, hunger and want, the basis of contracts which the American sovereign may legally be able to make, and which a misused equity power will enforce but which is an abdication of such sovereignty for the purpose of obtaining bread for self or family and further be it
>
> "Resolved, That we condemn any policy be it of a State or National scope, the purpose of which is to create bondage in any form or for any purpose, except as a punishment for crime." [41]

If this sounds like a strange analysis of an arbitration statute, it must be remembered that by signing shipping articles the individual seaman bound himself to serve on the voyage described in the articles. And if the agreements to arbitrate in such articles were made enforceable it was believed that the result would be a decision by a ship commissioner or consul having the force of law compelling the individual seaman to continue to serve. President Furseth explained it to the union's convention in these words:

> "You know that there is not a set of articles signed that has not in it some kind of rider, as I call it, something about this, that, or the other thing. I collected them together as near as I could and put them into the proceedings at the Philadelphia Convention and referred to them again at other Conventions. Now

[41] Proceedings, Twenty-Sixth Annual Convention, International Seamen's Union of America (1923) p. 84.

some of those riders are not prohibited plainly by law. There is nothing in the law that deals with it, but it goes to the very roc' of things all the same and the men are signing those riders right and left. I cannot pick up a set of articles anywhere but there is some such rider on it. And then there is usually at the end of the article, or somewhere in the article, a provision that any dispute arising shall be referred to the shipping commissioner and settled by him.

"Now the Shipping Commissioner Act says that after this disagreement has arisen and it is referred to him by the parties in question in a written statement, for a decision, then his decision is final. Now then the lawyers go a little further and they say, 'Well, if that can be done prior to the signing of the articles or at the signing of the articles and before the discrimination arises, why not refer it to the shipping commissioners completely?' Now the courts in several cases I think decided against certain riders as being extra legal or not legal at all. The ship owners took the case to the court of appeals, and the Union having money at the time the case came to my attention, I said to appeal it.

"Now the consuls find this thing in the articles, the average ship commissioner finds it in the articles and they without any hesitation say, 'Well, you signed this kind of thing and you stay by it,' and you have no remedy in the case of consul because you have no court to go to. In the case of shipping commissioners you have a remedy if you have the necessary money to get a lawyer and take it to the court, but if this bill is passed and this system adopted you could not get to the court at all. You will go nowhere except to the shipping commissioner and in the foreign countries to the consul. And that is all there is to it. You

cannot get anywhere because the road is blocked by legislation."[42]

As President Furseth's analysis, printed as an appendix to the convention's proceedings, put it:

"Thus it seems certain that this bill provides for re-introduction of forced or involuntary labor, if the free-man through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the sea-man, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in 'Interstate and Foreign Commerce.'

"With reference to the seaman it will be an easy matter. Place in *the contract to labor—the shipping articles*—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commissioner (under existing statutes this includes consuls), and the seaman's right to wages, to food, to damages under the Jones Act, *together with his present right to quit work in harbor,* becomes void. With the seaman the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make."[43] (Emphasis added.)

Unions, he believed, would not help. If they entered into arbitration agreements, they would be bound and it

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[42] *Id.* at 68.

[43] *Id.* at 203-204.

could then be argued that, through the organization, the individual members would be held to the same kind of involuntary servitude.[44]

The answer to all of this, of course, would be to make it plain that the Act would not be applied, either directly or indirectly, to the individual contracts of employment. And this is precisely what the Act, as finally drafted and passed in 1925, did.

To argue that this exclusion was intended to apply to grievance arbitration in collective agreements would imply extraordinary prescience to Congress. Grievance arbitration was just being born at the time. What Congress meant to exclude by the term "contracts of employment" was precisely what it said—the contracts by which individuals are employed.

C—*The agreement here does not involve "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."*

If, despite the real nature of the union objection to the Arbitration Act recited above, the Court should find that the exemption of contracts of employment contained in Section 1 of the Act was intended to exempt all labor arbitration because those who drafted it would not have recognized the distinction we draw today between collective agreements and contracts of hire, then, on the same principles, the exemption should be read as covering only what it was intended to cover, that is, contracts of seamen, railroad employees, and other workers engaged directly in foreign or interstate commerce. It cannot simultaneously be urged that the 1925 exemption should be read as it would have been read in 1925, but that the class of workers affected by the exemption should not be limited to the class of workers intended to be covered by the 1925 language. The workers in this case are not engaged in interstate commerce.

[44] *Id.* at 204.

They are engaged in industry affecting interstate commerce and hence are subject to the provisions of the National Labor Relations Act. If their collective agreement is to be regarded, erroneously, as a contract of employment, it cannot possibly be regarded as covering workers engaged in interstate commerce.

This has been the conclusion of the Second and Third Circuits [45] and we respectfully suggest that, if the conclusion of the First and Sixth Circuits [46] as to the meaning of "contract of employment" is to be rejected, then, on a similar basis, the holdings of the Second and Third Circuits as to the scope of the exclusion should be adopted.

D—***Were it not for the agreement to arbitrate, the District Court would have had jurisdiction.***

Section 4 of the U.S. Arbitration Act provides for a petition to "any U.S. district court which, save for such agreement [to arbitrate], would have jurisdiction" for an order directing that arbitration proceed in the manner provided for in the agreement. The authority of a district court to order arbitration may be argued to depend, under this language, upon whether the district court would have had jurisdiction over the claimed breach of contract under the *Westinghouse* case if there had been no agreement to arbitrate.

Judge Magruder's answer to this argument seems to us to need little amplification. The underlying rationale of *Westinghouse* seems to be that the courts should not be

[45] *Signal-Stat Corp.* v. *Local 475, United Electrical Workers*, 235 F. 2d 298 (2nd Cir. 1956); *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F. 2d 450 (3d Cir. 1953).

[46] *General Electric Co.* v. *Local 205, United Electrical Workers*, No. 276 this Term; *Hoover Motor Express Co.* v. *Teamsters Local 327*, 217 F. 2d 49 (6th Cir. 1954); *Local 19, Warehouse Workers Union* v. *Buckeye Cotton Oil Co.*, 236 F. 2d 776 (6th Cir. 1956).

required to handle a potential flood of individual wage claims. Refusal of an order directing that the parties settle such matters by arbitration would have the contrary result of leaving only a suit in court (albeit in a state court) as the remedy for refusal to pay wages.

In any case, even if *Westinghouse* is to be applied in such an inverse fashion, it does not affect the result in this case. Unlike *Westinghouse,* these are not grievances to recover wages alleged to be due to individual employees. The breach of the agreement which they allege is not the failure to pay money, but changes in established work loads and work assignments. The relief which they ask is a reversion to the prior system of work assignment, although in 4 of the 10 cases there is an incidental claim for extra compensation. (R. 20-23).

This kind of a claim is peculiarly a union claim. This is so because changes in work loads and assignments have a much broader effect than the effect upon the particular individuals who occupy the jobs when the changes are made. If unchallenged the changes become part of the established system and will apply to any employee who later may occupy the job. The parties recognized this when, in Article V, they specially provided that in this kind of a case, unlike other cases dealt with in the grievance procedure, a Union grievance as well as an employee grievance could be filed (R. *12*; cf R. *13*). And all of the grievances in this case were in fact union grievances filed by the shop committee and processed as such by the company.

Clearly the *Westinghouse* case does not hold that § 301(a) does not encompass jurisdiction over such claims. And therefore even if the restrictions in *Westinghouse* are to be read, at one remove, as limiting the cases in which the Federal courts will order arbitration, that limitation would not apply here.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision of the Court of Appeals for the Fifth Circuit should be reversed and the order entered by the District Court should be affirmed.

Respectfully submitted

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# APPENDIX A

## STATUTES INVOLVED

Section 301 of the Labor-Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 136, provides, in pertinent part, as follows:

> Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organizations may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

The United States Arbitration Act, 9 U.S.C. §§ 1-14, 43 Stat. 883, re-enacted, 61 Stat. 669, provides as follows:

> § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between the District

of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to Arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order direct-

ing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a fault in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in

filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion.

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance.

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action other-

wise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshall of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the suject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its descretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an ac-

tion in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshall of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment, docketing; force and effect; enforcement.

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected.

This title shall not apply to contracts made prior to January 1, 1926.

The Norris-LaGuardia Act (29 U.S.C. §§ 101-115, 47 Stat. 70) provides, in pertinent part, as follows:

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these

terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value:

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act

* * *

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed

and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the grant of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on conditions that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of

defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant, and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

* * *

Sec. 13. When used in this Act, and for the purpose of this Act—

* * *

(*c*) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

# APPENDIX B

(We reprint here the provisions of Article V of the June 27, 1953, agreement between the Company and the Union, exactly as they appear on pp. 8-11 of Exhibit A annexed to the Union's complaint in the District Court. These provisions also appear on pp. 16-19 of the record printed for use of the Court of Appeals and on pp. 11-13 of the record printed in this Court but with, unfortunately, a cumulative succession of typographical errors.)

## ARTICLE V

### Work Loads And Work Assignments

(A) It is mutually recognized and agreed that the best interests of and the economic security of the Employer and its Employees require that the Employer shall have and maintain reasonable and efficient workloads, machine assignments and work standards based on sound management, engineering principles and practices. In keeping with the foregoing, the Employer may from time to time revise and modify work assignments and/or piece rates and establish new work assignments or rates in accordance with recognized sound engineering principles and practices. It is agreed that piece rates and hourly rates are intended to be based on the full use of an employee's time during his work day, working at the normal operating pace of an average qualified employee with adequate allowance for fatigue and personal needs. The fatigue allowance will be enough so that the average employee can maintain his work assignment day after day without injury to himself. It is also recognized that normal machine or material delays or interferences will be compensated for in the standard. The Union and the affected employees shall have the duty and responsibility to accept workloads, machine assignments and piece rates, either new or changed, established in keeping with the above principles, and to cooperate fully with the Employer in giving said work assignments and piece rates a fair test. The procedure which will be followed is as follows:

(B) The Employer shall, upon written notice, have the right to change or modify existing work assignments

or piece rates and to establish new assignments or piece rates within the principles set forth in Paragraph (A) above. It is agreed that routine, minor, or day to day changes in methods, processes, or facilities on hourly paid jobs shall not be regarded as work assignment changes within the meaning of this Article; nor shall routine changes or mechanical corrections necessary to carrying out a scheduled program in connection with piece workers be considered a work assignment change within the meaning of this Article.

As has been done under prior Agreements the Employer will furnish the Union such information as may be available in order that the Union be aware of the changes made by the Company and the basis therefor, and the Company will give the employees such instruction as is necessary.

It is further agreed that when the changes are made effective, the employees will cooperate and perform to the best of their ability in order to give the change or modification a reasonable and fair test.

The first four (4) weeks immediately following the effective date of change or installation will be considered a trial period. During the first four (4) weeks of this trial period, the employees will be paid not less than their former average hourly earnings as provided in Paragraph (D) of this Article. By mutual agreement, the trial period may be extended beyond the four-week period, with or without a guarantee of average earnings.

(C) Any affected employee or the Union may file a grievance within two (2) weeks after the end of the trial period. If no grievance has been filed at the end of that time, the change or modification shall be considered established. If the Union feels that a rate for the changed assignment or workload of an hourly paid worker is out of line with that paid on other jobs with comparable workloads or assignments, it may raise such question as a grievance if it cannot be adjusted by negotiations.

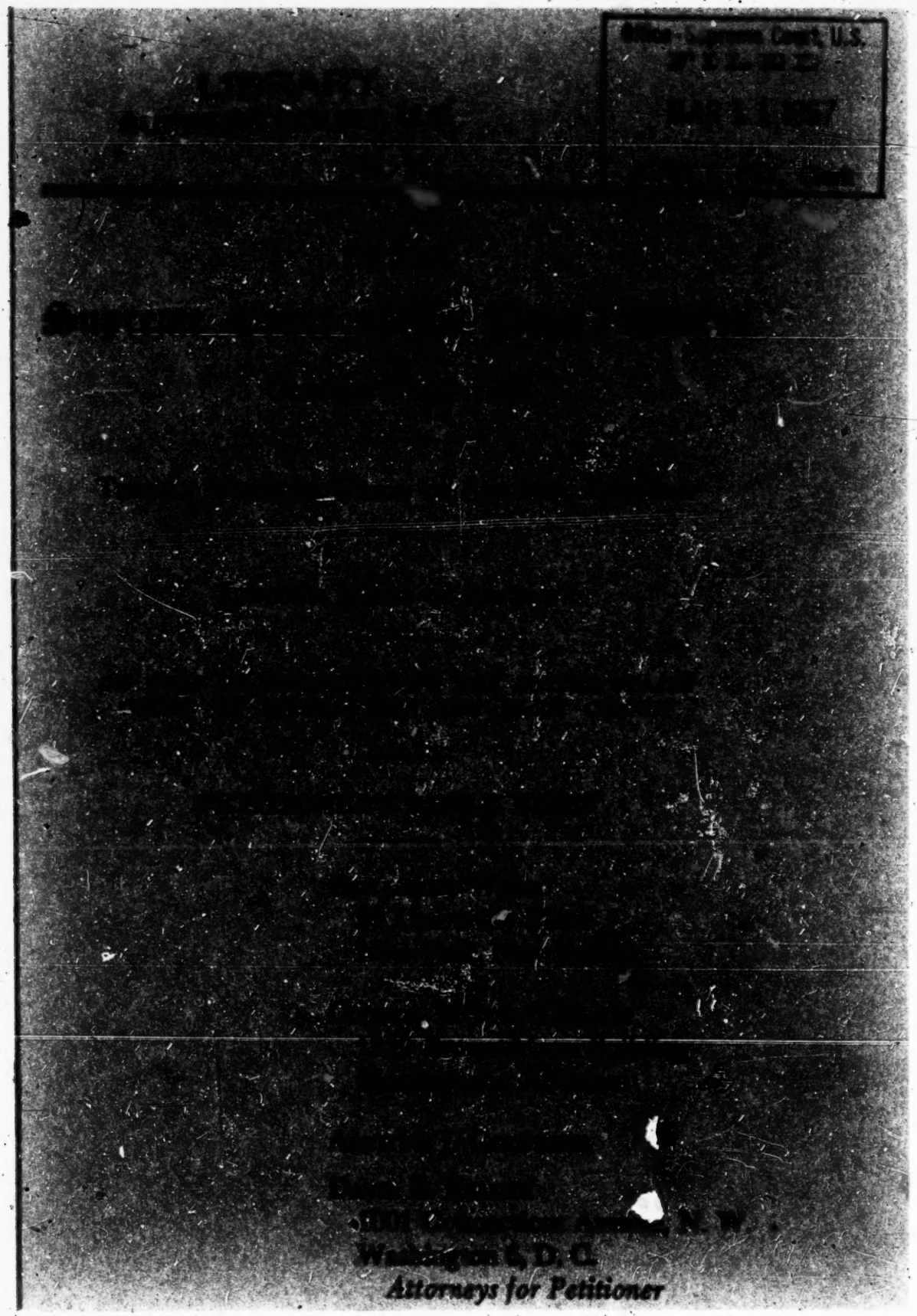
(D) Piece rates may be fairly adjusted by the employer in connection with work assignment changes. In such case the new rates shall be set to yield average hourly earnings for the group on the new work assignment which are not less than the average straight time hourly earn-

ings of the group on the old work assignment for the last Social Security Quarter which precedes the notice of change, except in cases in which the workload is found to be clearly out of line with the workload standards of the Employer heretofore found satisfactory or with other satisfactory workloads in the plant.

(E) In the event of an arbitration in which the Employer presents detailed standards based on adequate studies, the Board of Arbitrators shall give major consideration to the Employer's standards and studies (and their adequacy as measured by Paragraph (A) of this Article) to gether with the Union's objections to the validity of said standards and studies. If they order a change in the work assignment or piece rates they shall do so by specific reference to the factors in the Employer's standards which are found to be out of conformity with Paragraph (A), or improper, and shall clearly state the basis of such findings.

(F) It is further agreed that the Board of Arbitration shall have the right to adjust compensation retroactive to the date of the change.

(G) Any dispute arising from the operation or interpretation of Article V shall be subject to the grievance procedure up to and including arbitration.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IN THE

# Supreme Court of the United States

OCTOBER TERM 1956

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No. 211

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TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## PETITIONER'S REPLY BRIEF

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The brief for respondent Lincoln Mills of Alabama in this case contains, with one exception, no argument not already presented to the Court by the employer in the *General Electric* case, No. 276. Reply to those arguments has already been made in the brief for respondent union in the *Goodall-Sanford* case, No. 262, as well as in the brief for respondent union in the *General Electric* case itself. We will not burden the Court with repetition of matters set forth in those briefs and respectfully refer the Court to them. (A copy of the respondent union's brief in the *Goodall-Sanford* case has been served on the employer in this case.)

## I—THE DUTY TO ARBITRATE ACCRUED GRIEVANCES AFTER THE AGREEMENT ON WHICH THEY ARE BASED HAS EXPIRED.

The single exception referred to above is the contention of the employer here that arbitration of grievances which arose under the agreement which expired on July 3, 1954, cannot be ordered because the agreement expired on that date.[1] Of course, the contract has also expired in the other cases now before the court and no one has even thought to suggest that this is a defense against arbitration as to whether the employer complied with the collective agreement during the term. But here, respondent asserts, the contract expired before the employer refused to arbitrate. Therefore, it is argued, there was no breach of the arbitration agreement during its term upon which a later enforcement proceeding can be based.[1a]

This issue was argued in the Court of Appeals but was not decided. As stated in the petition for certiorari, the issue was expressly left undecided by the majority in that Court because of their conclusion that in no event did the Federal courts have jurisdiction to enforce an agreement to arbitrate grievances. Judge Brown, dissenting, apparently did not even consider the issue serious enough to warrant discussion.

Judge Brown was obviously correct. If analogy be had to commercial arbitration the fact that the contract has expired is, of course, irrelevant. Indeed, the nature of commercial arbitration is such that it is almost always true that the contract has expired when arbitration is demanded. The usual complaint is that one party to the contract failed to deliver the promised goods, or to accept them, or to perform a charter party, or to pay moneys owed. What such

[1] Respondent's Brief, pp. 33-37.

[1a] Obviously, although this is not stated, there was no breach of the agreement which succeeded the one that expired on July 3, 1954, since the grievances arose under the earlier agreement.

arbitration normally seeks is an adjudication of the rights which have accrued as the result of a closed and completed commercial transaction.

In grievance arbitration, of course, the considerations are somewhat different. Unlike the commercial agreement, a collective agreement is a continuing one, providing the governing rules which are to prevail for a fixed period, usually of years, in the administration of wages, hours and working conditions. At its expiration it is usually replaced by a new agreement which continues, with changes, the rules previously in force. Arbitration in collective agreements is provided, as in this case, as a method by which the union can, consistently with the agreement and while continuing to observe it, challenge the interpretation and application of those rules by the employer. As we have ourselves urged, it is not a substitute for litigation over a completed transaction but a substitute for the strike as a method of policing the observance of the terms of the collective agreement.

Respondent accepts this distinction and, indeed, seizes upon it. It asserts that "the sole purpose and effect" of the arbitration provision

> ". . . was to create mutual consideration between the Company and the Union whereby the Company agreed that it would follow a specific procedure in the handling, discussion, and attempting to dispose of timely grievances brought by the Union on behalf of the employees during the life of the Agreement, and the Union, in turn, agreed that during the period such procedures were in effect, that it would not exercise, or avail itself of, its legal right to strike."

Therefore, respondent argues, when the Union regained its right to strike upon the expiration of the agreement, there was no further consideration and the Company had no further obligation to arbitrate.[2]

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[2] Respondent's Brief, p. 34.

There are several difficulties with this argument. The most important is that when the contract terminated the Company had already received its consideration. The grievances here arose, during the term of the agreement, when the Company in April and May of 1954, made certain changes in work-loads and job assignments. The no-strike agreement operated at that time to prevent any concerted action by the Union in protest against the changes. Instead, as required by the agreement, grievances were processed through the machinery provided in the agreement for their resolution.

When the agreement expired on July 3, 1954, it is true this procedure had not been completed. But the Company had already received the benefit of the union's no-strike agreement. The fact that, when the contract terminated, the union did regain the right to strike—as the Third Circuit noted in *Paterson Parchment Paper Co.* v. *IBEW*, 191 F. 2d 252 (1951)—detracts nothing from the fact that it had refrained from striking over these grievances, in accordance with its agreement, prior thereto. As David L. Cole, one of the country's most experienced arbitrators, has said in connection with a different argument—that the termination of the employer's business voids the duty to arbitrate:

> "The Company's suggestion that now that the Company has discontinued manufacturing and similar operations there is no need for the grievance and arbitration procedure designed to maintain good industrial relationships is not acceptable. If during normal operations the parties were given the benefit of improved relations by reason in part at least of the existence of these procedures, then the procedures should not be discarded, unless it is compulsory to do so, the moment one of the parties feels itself no longer interested in harmony. This dispute grows out of the employer-employee relationship, and the factors which prompted

the parties to agree upon an expeditious and informal means of resolving their differences are still entitled to weight. Rights and obligations arising out of, or accruing during the period of, such an agreement, even though payable or enforcebale later, are tied by the contract to the means provided for enforcing them, which may reasonably be held to survive along with the rights and obligations themselves." *Botany Mills, Inc.*, 27 Labor Arbitration Reports 1, 2 (1956).

That the obligation to arbitrate disputes arising during the contract term must continue beyond the term for at least a sufficient time to permit the use of the procedure is so plain that it is difficult to find cases in which a contrary argument has been made. The few cases we have been able to find hold unanimously, and summarily, that "the fact that the contract is no longer in existence is immaterial."

*Lane* v. *Endicott Johnson Corp.*, 274 App. Div. 833, 80 N.Y.S. 2d 639 (3d, Dept. 1948) *affd* 299 N.Y. 725, 87 N.E. 2d 450 (1949).

*In re Poteker*, 286 App. Div. 733, 146 N.Y.S. 2d 616 (1st Dept., 1955) *reversing in part* 141 N.Y.S. 2d 719 (Sup. Ct. 1955).

*Columbia Casualty Co.* v. *Drivers & Chauffeurs Local Union*, 279 App. Div. 552, 107 N.Y.S. 2d 90 (1st Dept. 1951).

*In re Commercial Telegraphers Union*, 123 N.Y.S. 2d 259 (Sup. Ct. 1953)

*In re Freydberg*, 21 LA 816 (Sup. Ct. N.Y. 1954).

As the Court said in *Jones* v. *Tidewater Oil Co.*, 22 LA 562 (Calif. Super Ct., 1954):

"It is the opinion of the Court that such disputes would come under the category of 'unfinished business,' which should be arbitrated and thus completed regardless of the contract's expiration. The fallacy of

holding otherwise is best illustrated by pointing out that grievances or disputes arising during the last few days of the contract's existence could not possibly be arbitrated as provided by the agreement purely because of lack of time."

## II—THE QUESTION OF MOOTNESS.

In urging that the agreement to arbitrate unresolved disputes necessarily survives the termination of the agreement under which the disputes arose, we think it only fair to note that this general obligation would not prevent an employer from urging before an arbitrator that a particular grievance has become moot. This is an entirely different question—which has not been raised by the respondent in this case.

The fact that a collective agreement has expired may make some grievances moot. Whether it does so depends upon the nature of the grievance and the presence or absence of a continuing collective bargaining relationship represented by a new collective agreement which maintains the existing rules and standards in effect.

Some grievance arbitrations concededly have only prospective significance. Work load and safety grievances, in particular, are sometimes of that character. In other cases, the grievance may have both prospective and retrospective significance: the arbitration may decide not only what the proper rule should be under the agreement for the future but also whether retroactive pay is due, and how much, because of actions taken in the past. A discharge grievance is typical; the arbitrator's decision, if favorable to the union, will usually require both reinstatement of the discharged employees and back pay. Some grievances, finally, may have only retrospective significance, where the incident involved is isolated and non-repetitive and the only question is back pay or other benefits or where, as in the *Good-*

*all-Sanford* case, No. 262, the employer has gone out of business.

Obviously, in the case of a grievance with prospective significance only, if the contract has expired and there is not a continuing collective bargaining relationship represented by a new collective agreement, there may be nothing to arbitrate. Take a simple work load grievance in which there is no question of back pay. If the collective agreement has expired and it is not replaced by a new one, then the employer, as respondent here says, is free to manage its properties and business as it sees fit. It can increase or decrease work loads without reference to any standards at all. Under such circumstances, arbitration of a grievance claiming that work loads in the future should be adjusted to comply with an expired contractural standard would be meaningless. The grievance would be moot.

This is far different from saying that a company's agreement to arbitrate existing grievances terminates when the contract expires. Expiration of the agreement is simply a fact—similar to the fact that a grievant has died—which may or may not make a particular grievance moot, depending upon the nature of the grievance, the kind of relief requested in the arbitration, and whether or not the standards and obligations provided in one agreement are carried over into the next.

The grievances in this case are work load and job assignment grievances. Respondent, however, has not claimed that they are moot. In particular it has not urged that a decision as to the work assignments involved would not be effective under the contract which replaced the one that expired in July, 1954.[3] Even if it did, some of the grievances

[3] Such an argument, if made, would undoubtedly fail. After the contract here involved expired there was a strike. The strike was settled by an agreement that the July 3, 1954 agreement, with certain modifications, should remain in effect until June 30, 1957. It was also expressly agreed that the grievances involved in the present litigation would be arbitrated if so ordered by the Court.

—those that expressly ask for back pay commensurate with the increase in work loads instituted in April and May, 1954[4]—clearly cannot be moot. And back pay may be due in the other grievances, even if not specifically demanded, under the terms of Article VII (E) of the Agreement (R. 13), which provides that in any work load grievance "the Board of Arbitration shall have the right to adjust compensation retroactive to the date of any change."

Any possible question of mootness of particular grievances is properly left for the arbitrator to decide. The fact that back pay for work performed in April, May and June in 1954 clearly is involved in some of the grievances here does serve, however, to underline the error in respondent's argument that when the contract expired on July 3, 1954, the Company's obligation to arbitrate any grievances—including those dealing with pay for work already performed—terminated.

Respectfully submitted

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FILED
FEB 21 1957
JOHN T. FEY, Clerk

No. 211.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

TEXTILE WORKERS UNION OF AMERICA,
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v.

LINCOLN MILLS OF ALABAMA.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## BRIEF

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No. 211.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

TEXTILE WORKERS UNION OF AMERICA,
Petitioner,

v.

LINCOLN MILLS OF ALABAMA.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## BRIEF

**For Lincoln Mills of Alabama.**

## STATEMENT OF THE CASE.

A written collective bargaining agreement was executed between the Petitioner, Textile Workers Union of America, and Lincoln Mills of Alabama (hereinafter referred to as the "Union" and the "Company") on June 27, 1953. (R.

4-18). This Agreement provided that upon sixty days' notice given by either party prior to July 3, 1954 such Agreement would terminate as of that date (R. 18). The Record shows that as a result of appropriate notices given by the parties, that the Agreement did, in fact, expire on July 3, 1954 (R. 34, 44).

The Agreement contained, inter alia, a detailed Grievance Procedure, set forth in Article VIII thereof (R. 13-15), with specified time limits at each step if the grievance remained unresolved in the preceding step.

Article IX of the Agreement dealt with strikes, lockouts and arbitration. Paragraphs A through E of Article IX (R. 15, 16) provided that the Union would not sanction, or call, or approve of any strike or other stoppage of work during the life of the Agreement and the Company would not lock out the employees during the life of the Agreement. The Agreement further provided in Article IX, Paragraph F (R. 15-17) that grievances between the Union and the Company arising from the operation or interpretation of the Agreement, which had not been settled satisfactorily in the grievance procedure would be submitted to arbitration, with certain exceptions. It is significant that the no-strike clause and the arbitration procedure are contained in the same article of the Agreement. The entire Agreement, including the arbitration and no-strike clauses, expired on July 3, 1954.

On June 23, 1954, eight days before the expiration of the Agreement, the Union filed seven written grievances, and on June 24, the Union filed three additional written grievances with the Company. These grievances related to certain alleged changes in job duties and work assignments which the Union was protesting on behalf of the individuals affected. These grievances were attached to the Complaint as Exhibits B through K (R. 19-28). After

these grievances were filed, but before the written answer of the Company to the grievances was due under the terms of the Agreement, the Agreement expired. The Company nevertheless, in keeping with its obligation to bargain in good faith with the Union as the duly certified bargaining agent under the National Labor Relations Act, met and bargained with the Union concerning these grievances. Its ultimate answers and position were reduced to writing and entered as its final written statement of position on copies of the grievances. Such answers appear in the Record as parts of Exhibits B through K, supra.

After several bargaining sessions on the grievances, in which it became apparent that the Company would not accede to the Union's demands, the Union sought to have these disputes submitted to final and binding arbitration under the terms of the Agreement, which had expired some weeks prior to the Union's demand for arbitration. There is no dispute as to the fact that the requests or demands for arbitration of the grievances, as well as the bargaining negotiations relating to the grievances, all took place after the expiration of the Agreement on July 3, 1954. The Company declined to agree to submit the disputes to final and binding arbitration under the terms of the expired agreement, or on any other basis.

The Union thereupon brought the instant case in the District Court for the Northern District of Alabama under Section 301 of the Labor Management Relations Act of 1947, alleging a breach of the Agreement by the Company as a result of its refusal to submit the grievances to final and binding arbitration under the terms of the Agreement which had previously expired. The Complaint sought specific performance of Article IX-F, Arbitration. It sought an Order restraining the Company from "refusing to perform its obligations under Article IX of the Agreement . . ." with respect to the grievances; it sought an injunc-

tion to the same effect. It sought incidental damages and, in the alternative, to specific performance, sought general damages (R. 3, 4).

After hearing the matter, the District Court issued Findings of Fact, Conclusions of Law, and a Judgment in which it held:

(a) That the Union had not proved and was not entitled to recover damages (R. 36);

(b) That the remedy sought by the Union was available because of rights granted under Section 301 of the Labor Management Relations Act of 1947 (R. 34); and

(c) That a mandate should issue directing the Company to arbitrate the subject grievances; and

(d) that a restraining order should issue restraining the Company from failing or refusing to comply with Article IX-F of the Agreement.

From the Order of the District Court, the Company appealed to the Court below. On appeal the Court below, in reversing the trial court, held as follows:

(1) That the Norris-LaGuardia Act does not preclude the granting of the relief sought;

(2) That Section 301 of the Labor Management Relations Act of 1947 does not provide or furnish a basis for granting enforcement of an executory covenant for the submission to arbitration of grievances pursuant to a collective bargaining agreement between an Employer and a Union.

(3) That a collective bargaining agreement is a contract of employment within the meaning of the exclusionary clause in Section 1 of the U. S. Arbitration Act, and, as such, is excluded from the application of the Act by its express terms.

(4) That nothing of Federal origin or in the laws of the State of Alabama provides a basis for granting the relief prayed for and that the District Court therefore had no jurisdiction to grant such relief, and that the Complaint should have been dismissed.

(5) Having concluded that compliance with an executory covenant for arbitration in a collective bargaining agreement would not be enforced by a Federal Court Judgment where the Courts of the State would deny such relief, the Court below did not rule on the question of whether or not such a covenant would survive beyond the termination date of the Agreement in which it was contained.

## SUMMARY OF ARGUMENT.

I.

The District Court and the Court below properly found that the Courts of Alabama have and do follow the common law rule against judicial enforcement of executory covenants to arbitrate.

The Court below correctly concluded that Section 301 of the Labor Management Relations Act of 1947 does not confer upon the District Courts authority to grant specific performance or mandatory injunctions enforcing executory covenants to arbitrate in collective bargaining agreements.

Since the law of the State of Alabama does not furnish a basis upon which the District Court could grant the relief sought, such basis must be found under the Federal law, or the remedy does not exist. Section 301 does not furnish the remedy. At most, Section 301 does no more than provide for suits for damages for breach of contracts between labor unions and employers engaged in interstate commerce. Neither the wording of the statute itself nor the legislative history surrounding its enactment indicate that Congress was concerned with anything more than eliminating certain procedural obstacles to suits by and against labor organizations. The wording of the statute and the legislative history do not indicate an intention to create new remedies in the Federal Courts which were not previously available.

The legislative history of Section 301 indicates that Congress specifically considered providing for judicial enforcement of executory covenants to arbitrate and after consideration decided against such legislation.

In enacting the Labor Management Relations Act of 1947, Congress was very careful to spell out those areas

in which the equitable remedies of the Federal Courts would be available. In every such case Congress was careful to remove the jurisdictional limitations placed upon the Federal Courts by the Norris-LaGuardia Act.

Congress had, on more than one occasion, prior to the enactment of Section 301 considered legislation which would have provided for judicial enforcement of such agreements, and on each instance turned down such legislative proposals.

In light of the historic common law rule against judicial enforcement of executory agreements to arbitrate, and in further light of the legislative history of Section 301 and prior legislative proposals in this field, the conclusion must be drawn, as drawn in the Court below, that Section 301 does not provide a basis upon which the District Court could have granted the relief prayed for.

## II.

The Court below correctly concluded that the United States Arbitration Act is not applicable in the instant dispute and does not furnish a remedy which may be used by the District Court in decreeing specific performance of executory covenants to arbitrate contained in collective bargaining contracts.

The coverage of the United States Arbitration Act does not extend to the field of industrial disputes or labor relations. It applies only in the field of commercial disputes, and to that end Congress specifically exempted labor disputes from its coverage. The legislative history of the Act fully bears this out.

Section 1 of the United States Arbitration Act specifically excludes "contracts of employment" of ". . . workers engaged in interstate or foreign commerce." A

collective bargaining agreement is a "contract of employment" within the meaning, design, and intent of that exclusionary clause. This, too, is borne out in the legislative history.

Both before and after the enactment of the Arbitration Act, Congress understood that executory agreements to arbitrate contained in "contracts of employment" or collective bargaining agreements were not enforceable in the Federal Courts. In spite of this knowledge, and in the face of attempts to pass legislation changing this long-standing rule in the Federal Courts, Congress has on each occasion refused to provide for judicial enforcement in this field, although proposals to provide for it have been made both by way of amendment to the Arbitration Act itself and by separate legislation designed to accomplish that purpose.

In light of the express exclusion of labor disputes by Section 1 of the U. S. Arbitration Act; in view of the several rejections of Congress of legislation to change the rule in the Federal Courts, and in view of the extensive policy and procedural matters involved in judicial enforcement of labor arbitration agreements, the Federal Courts should not undertake to supply legislation to that end when Congress has failed or refused to enact it. The soundness of such a change in Federal policy is a proper determination for Congress, and not for the Courts.

III.

Because of the jurisdictional limitations placed upon the United States Courts by the Norris-LaGuardia Act in the issuance of injunctions in cases growing out of labor disputes, the District Court did not have jurisdiction of the matter and could not have granted the relief prayed for by the Union.

The dispute herein grows out of a controversy over certain work assignments effected by the Company. Thus, the case is one concerning "terms or conditions of employment" within the meaning of a "labor dispute" as defined in Section 13 (c) of the Norris-LaGuardia Act.

The Norris-LaGuardia Act is in all respects applicable in this case. The legislative history of the Labor Management Relations Act of 1947 and more specifically, of Section 301 thereof, shows that Congress was mindful of the jurisdictional limitations placed upon the Federal Courts by that Act. Such legislative history also shows that although specific proposals were made in Congress with reference to Section 301, which would have removed the jurisdictional restrictions of the Norris-LaGuardia Act in cases brought under the Section, such proposals were rejected and only that portion of Norris-LaGuardia relating to determinations of agency was in any way modified in this connection.

Congress was very careful, in enacting the Labor Management Relations Act of 1947, to provide for the removal of the jurisdictional obstacles of Norris-LaGuardia in those areas where it felt that the equitable or injunctive powers of the Federal Courts should be exercised. Congress, just as carefully, refrained from removing those jurisdictional restrictions in their application to Section 301.

In enacting the Norris-LaGuardia Act, Congress recognized that the jurisdiction of the Federal Courts might from time to time be altered or enlarged and to that end provided that in the application of the Act, the term "United States Court" included any Court of the United States upon which jurisdiction might be conferred, defined, or limited by future Congressional Act. Thus, Congress intended for the Norris-LaGuardia Act to be applicable to all labor disputes as defined in that Act unless it specifically provided to the contrary.

There is no valid distinction between a decree of specific performance and a mandatory injunction which would alter the result here.

In the light of the clear language of the Norris-La-Guardia Act and the specific determination by Congress as to its application to cases brought under Section 301; and Congress's ultimate refusal to limit its application in such cases, that Act stands as a jurisdictional bar to the granting of the relief sought in this matter.

IV.

Even if this Court should hold that executory covenants to arbitrate contained in collective bargaining agreements are enforceable in the Federal Courts, the covenant to arbitrate in the instant matter is not enforceable for reasons outside of those set forth in Sections I, II and III of this Argument.

The Record shows, and it was found by the Court below, that the contract in the instant matter had expired a number of weeks prior to both the request for arbitration by the Union and the refusal to arbitrate by the Company. When the contract expired, a fortiori, the mutual covenants and obligations between the parties under its terms also expired.

When the contract expired the Company was under no legal obligation other than that placed upon it by the Labor Management Relations Act to bargain in good faith with the union in reference to matters of wages, hours and working conditions, including grievances. Such obligation to bargain in good faith does not include a r quirement that the Company agree to final and binding arbitration of differences between it and the Union. The Union likewise was under no obligation other than that imposed on it by the Labor Management Relations Act. Its right

to strike was in no way limited or impaired by its obligations under that Act.

It is apparent that upon the termination of the Agreement that the Union was no longer bound by the no-strike clause contained in Article IX thereof, and the Company was no longer bound by the provisions for final and binding arbitration contained in the same Article of the Agreement. These mutual obligations had furnished the consideration running to the parties for their respective covenants as to these matters.

To force the Company to comply with obligations which existed during the term of an expired contract, while at the same time recognizing that the Union's obligations assumed by it in return therefor, are no longer effective and cannot be enforced is not equitable and does not do equity.

**I. The Court Below Correctly Concluded That Section 301 of the Labor Management Relations Act of 1947 Does Not Confer Upon the District Court Authority to Grant Specific Performance or Mandatory Injunctions Enforcing Executory Covenants to Arbitrate in Collective Bargaining Agreements.**

At the outset of this matter, the Court below considered the law of Alabama and unanimously agreed with the District Court that the Courts of Alabama will not, under the laws of that State, enforce executory agreements to arbitrate. In the Opinion below, the Court noted the following holding of the Supreme Court of Alabama:

> ". . . The courts are almost unanimous in declaring that equity will not decree specific performance of a contract to submit a cause to arbitration, while it will, in proper cases, entertain a bill to enforce an award. . . ."
>
> **(Ex parte Birmingham Fire Insurance Co., 223 Ala. 370, 172 S. 99.)**

See also in this connection:

> ". . . While the chancery court has jurisdiction and power to enforce an award of arbitrators appointed by the parties, it is without authority to carry out a mere agreement to submit matters in controversy to arbitration. . . ."
>
> **(Caldwell v. Caldwell et al., 157 Ala. 119, 47 So. 268.)**

and **Black v. Woodruff**, 193 Ala. 327, 69 So. 97.

Having found that the Courts of Alabama would not enforce an executory agreement to arbitrate, the Court of Appeals then considered whether or not the Federal Courts were empowered to enforce an executory covernant to arbitrate contained in a labor-management agreement. In this connection, the Court, after reviewing this Court's decision in **Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.**, 348 U. S. 437, 75 S. Ct. 488, 99 L. ed. 510, concluded that Section 301 of the Labor Management Relations Act does not provide or furnish a source or basis for fashioning a rule requiring or permitting the enforcement of an executory covenant for arbitration in a labor agreement. After noting Mr. Justice Frankfurter's view, with whom Justices Burton and Minton concurred, that "no new Federal law concepts of contractual interpretation were created" by the enactment of Section 301, the Court of Appeals then decided the case fully holding that Section 301 did not provide a basis upon which the District Court could have granted the relief prayed for.

Following the lead of this Court in the **Westinghouse** case, the Court of Appeals did not pass upon the question of whether or not Section 301 is unconstitutional. Nor do we believe that the ultimate constitutionality of Section 301 need be decided in the instant matter.

Congress in enacting Section 301 of the Labor Management Relations Act of 1947 did not intend to confer, and did not confer, upon the District Courts power to decree specific performance of executory covenants to arbitrate in collective bargaining agreements, nor did Congress in enacting Section 301 create a new remedy where such remedy was not previously available. Moreover, we submit Congress did not intend to, nor did it create, by enacting Section 301, a remedy available to a litigant who brings his action in a Federal District Court which is different from the remedy available to the litigant who brings the same action in a State Court. **Erie R. R. v. Tompkins**, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817; **Guaranty Trust Co. v. York**, 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464; **Bernhardt v. Polygraphic Co.**, 350 U. S. 198, 100 L. ed. 199, 76 S. Ct. 273.

Both State and Federal Courts have historically under the comon law rules and in the absence of statute, refused to enforce executory agreements to arbitrate. This rule has been followed by Federal Courts as well as the Courts of the various states. **Red Cross Lines v. Atlantic Fruit Co.**, 264 U. S. 109, 120-121 (1924); **Simmons Company v. Crew**, 84 F. 2d 82 (1936), 4th Cir., cert. den. 299 U. S. 569 (1936); **Tejas Development Co. v. McGough Bro.**, 165 F. 2d 276, 279-280, 5th Cir. (1947); **Restatement of Contracts**, No. 550 (1932).

While there have been some changes in the common law rule as a result of legislation in a few states, the pattern of legislation in this field among the States has been by no means consistent. See **Gregory & Orlikoff, The Enforcement of Labor Arbitration Agreements**, 17 Chi. L. Rev. 233, 238, 245 (1950); 6 Williston Contracts, Sec. 1920 (Rev. Ed., 1938). Alabama follows the common law rule. See **Ex parte Birmingham Fire Insurance Co.**, supra, **Caldwell v. Caldwell**, supra.

The Congress of the United States has considered the question of enforcement of contracts to arbitrate in labor relations matters on several occasions. In each instance, Congress has failed or declined to provide for judicial enforcement of covenants contained in labor management agreements to arbitrate future disagreements. Such matter was first considered by the Congress in the enactment of the United States Arbitration Act, discussed hereinafter in Section II, infra. Subsequent thereto, the original legislative proposals for the Wagner Act contained provisions for the enforcement of labor arbitration agreements, but these were deleted from that Act prior to its passage.[1]

It is in this background of prior legislative history that the intent and purpose of Section 301 of the Labor Management Relations Act of 1947 and the history surrounding its enactment and inclusion in the Act must be considered. We submit that, first of all, if there was an intent on the part of Congress that Section 301 was to authorize or provide the particular remedy of specific performance or mandatory injunctions to enforce executory agreements to arbitrate in the Federal Courts where it had not previously been available, such an intention would have represented a complete reversal of previous Federal and Congressional policy in the field. The language of Section 301 does not in any way indicate that such a result was intended or contemplated. Nowhere does it make reference to new remedies for injunctive or equitable relief or of equitable remedies for specific enforcement of labor contracts generally much less of executory agreements to

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[1] See S. 2926, 73d Cong., 2d Sess. (1934), Sec. 9 (a); also H. R. 8423, 73d Cong., 2d Sess. (1934), and S. 1958, 74th Cong., 1st Sess. (1935), and H. R. 6187 and H. R. 6228, 74th Cong., 1st Sess. (1935). See also S. 2350, 77th Cong., 2d Sess. (1942); 88 Cong. Rec. 2071.

arbitrate. If the "plain meaning" rule is applied, the language of Section 301 seems clearly to deal only with suits for damages which might result from breaches of contracts between unions and employers. This is borne out by the fact that Section 301 expressly waives jurisdictional requirements relating to amount in controversy and diversity of citizenship and makes specific provision for the enforcement of money judgments against union assets alone. Rules for the determination of agency with reference to labor unions are set forth, indicating that Congress was fully aware of the fact that the Federal Courts were severely limited in making determinations of agency in labor dispute matters by the Norris-LaGuardia Act, 29 U. S. C. A. 101 et seq. The reading of the statute itself, we submit, clearly and obviously implies that Congress' sole intention in enacting Section 301 was to remove some of the procedural obstacles to suits against and by labor unions in order that suits for damages for violations of collective bargaining agreements could be brought in the Federal Courts either by or against unions, or by or against employers, without reference to the diversity of citizenship or jurisdictional amount requirements and without the limitations imposed by various State laws governing suits by and against unincorporated associations. This is in accord with the quotation from Mr. Justice Frankfurter's opinion in the **Westinghouse** case, supra, quoted with approval by the Court below:

> ". . . It was evident that the specific desire was to remove procedural obstacles to suit by and against the union. . . . Senator Taft in proposing an amendment approximating Section 301 as saying:
>
> " 'All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations and suable in the Federal Courts if

the contract involves interstate commerce and therefore involves a Federal question.' . . ."

**Lincoln Mills of Alabama v. TWUA** (R. 52).

We further submit that the clear indication that Congress did not intend, in enacting Section 301, to authorize the Federal Courts to grant injunctive relief (either prohibitory or mandatory) is amply supported by other Sections of the Labor Management Relations Act of 1947, and by a consideration of the whole Act in context. The Act clearly indicates that wherever Congress felt that the equitable remedy of injunction was needed, or to be authorized, Congress was careful to spell out its intention in such regard and to provide when, and by whom, such injunctive relief in the Federal Courts could be sought, and to specify the occasion and circumstances wherein the Federal Courts were authorized to grant such injunctive relief. As examples of this, Congress provided in the Act that the Courts of Appeal could "grant such temporary relief or restraining order as proper in enforcing orders of the National Labor Relations Board" [Section 10 (e), 29 U. S. C., Sec. 160 (e)]; the District Courts are authorized to grant injunctive relief on petitions of the National Labor Relations Board in certain specified cases [29 U. S. C., Sec. 160 (j), 160 (l)] and to enjoin certain strikes upon petition of the Attorney General of the United States (29 U. S. C., Sec. 178).

We submit that it is highly unlikely that Congress, having evidenced throughout the Act its clear intention to spell out and expressly limit those areas in which it authorized the District Courts to grant injunctive relief in labor disputes, intended to create or authorize the remedy sought here by indirection or inference and without express provision for it. Indeed, we submit that the Joint Conference Report on the final bill makes clear that Congress actually intended only that the traditional remedy

of damages for breach of a collective bargaining agreement, whether executed or executory, should alone be applicable.[2] Moreover, when the Act was being considered in the two Houses of Congress, the House Bill and the Senate Bill each contained provisions setting up a procedure for enforcement of agreements to arbitrate under collective bargaining agreements.[3]

Both of these Bills provided that a refusal to abide by an agreement to arbitrate would be an unfair labor practice under the Act and the procedures under the National Labor Relations Act would be available to remedy such an unfair labor practice. However, these provisions in both bills were eliminated and were not included in the final bill. Thus, it cannot be successfully argued, we submit, that Congress was not aware of the problems of arbitration as they existed in the field of labor management relations at the time of the enactment of Section 301. Congress deliberately, we submit, refused to provide for the enforcement of such arbitration agreements. In the light of this, we submit, that Section 301 may not be held to encompass or authorize a remedy which Congress specifically refused to make available in enacting it.[4]

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[2] See H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., where after discussing provisions in a bill which would have made it an unfair labor practice to violate terms of a Collective Bargaining Agreement, or an Agreement to submit a dispute to arbitration, the report states as follows:

> "The Conf. Agreement omits this provision of the Senate amendment. Once the parties have made a Collective Bargaining Contract, the enforcement of that contract should be left to the usual processes of law and not to the Labor Relations Board" (pp. 41-42).

[3] See Senate 1126 as reported to the 80th Congress, First Session, and H. R. 3020 as passed by the House, 80th Congress, First Session.

[4] A much more detailed legislative history of Section 301 of the Labor Management Relations Act is contained in the Brief of the Petitioner in Case No. 276, *General Electric Co. v. Local 205, United Electrical, Radio & Machine Workers, etc.*, which is pending before this Court at this time.

Thus we submit that in adopting the reasoning set forth in Mr. Justice Frankfurter's opinion in the Westinghouse case, supra, the Court below was correct in concluding, as it did, that Section 301 of the Labor Management Relations Act of 1947 does not provide or furnish a basis upon which the Federal District Courts may grant specific performance of an executory covenant to arbitrate which may be contained in a collective bargaining agreement.

On February 4, 1957, the United States Court of Appeals for the Seventh Circuit, in **United Steel Workers of America et al. v. Galland-Hemning Manufacturing Company** considered an identical matter and expressly concurred with the ruling of the Court below in the instant matter.[5]

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[5] "It does not follow that because jurisdiction is given to the Federal Courts that there is a new Federal law or concept that authorizes the courts to enforce submission to arbitration . . . Section 301 does not of itself provide or furnish the force for such a rule (requiring or permitting the enforcement of a covenant for arbitration of grievances). We hold there is no legal right to the relief sought. . . ."

(*Lincoln Mills v. TWUA*, R. 54.)

"The legislative history of the provision (301) as related by the Court in *Westinghouse* strongly supports the premise that the sole purpose of Congress was to provide a forum and not create substantive rights. The Fifth Circuit in Lincoln Mills of Alabama v. Textile Workers Union of America, 230 F. 2d 81, relied upon the Westinghouse case in support of its holding that Section 301 is merely a jurisdictional provision. We agree not only with the result reached by the Court in that case, but also with its appraisement of the decision of the Supreme Court in *Westinghouse*. . . ."

(*United Steel Workers of America et al. v. Galland-Hemning Mfg. Co.*, ... F. 2d ..., No. 11,774, 7th Circuit) ... CCH ...; 31 Labor Cases 93,237, CCH.

## II. The Court Below Correctly Decided That the United States Arbitration Act is Not Applicable in the Instant Dispute and Does Not Provide a Remedy Which May Be Used By the District Courts in Decreeing Specific Performance of Executory Covenants to Arbitrate in Labor Dispute Matters.

The Court below, after considering the views of the other Courts of Appeal that had this issue before them, concluded that a collective bargaining agreement between a union and a company engaged in commerce is a "contract of employment" within the meaning of the exclusionary clause of Section 1 of the U. S. Arbitration Act, 9 U. S. C. 1,[6] and in so doing, the Court below aligned itself with the majority of those Courts which had previously considered the matter.[7]

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[6] "Sec. 1. 'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy would be embraced with admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. . . ."

[7] *Signal-Stat Corporation v. Local 475, United Electrical, Radio & Machine Workers*, 235 F. 2d 298, 2d Cir. (1956); *Amalgamated Ass'n v. Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310, 3d Cir. (1951); *Pennsylvania Greyhound Lines, Inc., v. Amalgamated Ass'n*, 193 F. 2d 327, 3d Cir. (1952); *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F. 2d 221, 4th Cir. (1954); *United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F. 2d 33, 4th Cir. (1948); *United Steel Workers of America et al. v. Galland-Henning Mfg. Co.*, supra, 7th Cir.; *Mercury Oil Co. v. Oil Workers International Union*, 187 F. 2d 980, 983, 10th Cir. (1951).

Almost simultaneously with the decision of the Court below in the instant matter, this Court decided the case of **Bernhardt v. Polygraphic Company of America, Inc.**, 350 U. S. 198, 100 L. ed. 199, 76 S. Ct. 273, and in that decision held that Sections 1, 2 and 3 of the U. S. Arbitration Act are "integrated parts of a whole" and are all part of a "regulatory scheme". Thus Section 1 of the U. S. Arbitration Act is applicable to the entire Act and likewise the exclusionary clause under Section 1 of the Arbitration Act would also be applicable.

While there have been some efforts to distinguish or to give technical construction to establish differences or distinctions in meaning by various interpretations of the phrase "contract of employment" as contained in Section 1 of the Arbitration Act, the legislative history available and the design and scheme of regulations in the U. S. Arbitration Act impel the conclusion that a collective bargaining agreement comes within the exclusionary provisions of Section 1 of that Act.

In considering the exclusionary provisions of Section 1 in the context of legislative history, it is apparent that Congress intended to make the U. S. Arbitration Act applicable only to commercial arbitrations and expressly to make it inapplicable to labor-management controversies or contracts.

For several years prior to the enactment of the U. S. Arbitration Act, the American Bar Association had been particularly concerned with providing an economical and speedy method of settlement of disputes between business men and commercial interests growing out of the commercial transactions between them. In order to facilitate the settlement of such disputes, the American Bar Association, by and through its Committee on Commerce, Trade and Commercial Law, undertook to draft and sponsor a Bill in Congress which would provide for the arbitration of com-

mercial disputes where the parties had agreed voluntarily to so arbitrate.[8]

The original Bill as introduced in the Senate and House (S. 4214, H. R. 13522), in 1922 did not contain the language presently contained in Section 1 of the Arbitration Act which excludes from its scope and coverage "contracts of employment". The original bill as introduced was strongly objected to by representatives of organized labor. In particular, strong objection to the Bill was advanced by representatives of the International Seaman's Union of America.[9]

The objections by the Seamen's Union grew out of its stated aversion to judicial interference not only with respect to the individual employment contracts of seamen, but also with respect to its collective bargaining agreements, a number of which were in effect at the time.[10] Objections to the Bill as introduced were also expressed by other labor organizations.[11]

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[8] The actions of the American Bar Association in connection with its preparation and sponsoring of the Act may be found in 50 A. B. A. Rep. 356-362 (1925), also A. B. A. Journal, March, 1925, p. 153.

[9] Proceedings of the 26th Annual Convention of the International Seaman's Union of America, 203, 1923. Also, hearing before a Sub-Committee of the Committee on the Judiciary, U. S. Senate, 67th Congress, 4th Session, S. 4213 and 4215, p. 9.

[10] Three of the Seamen's Union's districts had at that time collective agreements with employers which contained arbitration clauses. These were the agreements covering the East Gulf Sailors Association, Marine Firemen & Water Tenders Union of Atlantic and Gulf, and Marine Cooks and Stewards Association of Atlantic & Gulf. (Proceedings of the 24th Annual Convention of the International Seamen's Union of America, 186, 190, 191 [1921].)

[11] See Proceedings of the 45th Annual Convention of the American Federation of Labor (1925).

Collective agreements containing arbitration clauses existed at that time in trades and industries other than those represented by the Seaman's Union. For example, Garment Workers Union, Electrical Workers, Teamsters, Mine Workers, Boot and Shoe Workers

In the light of the strong opposition from labor generally and perhaps at the suggestion of the then Secretary of Commerce, Mr. Hoover, the Bill was redrafted and reintroduced in Congress in 1923.[12] The Bill as redrafted and reintroduced contained the exclusionary clause which appears in Section 1 of the Act. The Bill containing such language eventually was passed by Congress in 1925.[13]

That the subject-matter of the Bill when pending before Congress was concerned with commercial disputes is best indicated by the fact that the Committee Hearings in Congress described the Bill as one dealing with the arbitration of "interstate commercial disputes". (Joint Hearings before the Sub-Committee of the Committees on the Judiciary on S-1005, H. R. 648 (68th Cong., 1st Sess. 2 [1924].)

The Congressional Reports on the Bill and the extensive hearings which were participated in almost exclusively by representatives of trade and business associations do not contain any material which would in any way indicate that the then pending measure was intended to apply in any manner to the arbitration of labor disputes (H. R. 96, 68th Cong., 1st Sess. 1924; Senate Report 536, 68th Cong., 1st Sess. 1924).

The discussion of the Act on the floor of Congress also clearly evidences the congressional intent to solely provide a basis for the enforcement of arbitration provisions contained in commercial and admiralty contracts. For ex-

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and Machinists all had collective agreements in effect at that time. See 53 A. B. A. Rep. 359 (1928); Millis & Montgomery, Organized Labor 708-713 (1st Ed., 1945); Witte, Historical Survey of Labor Arbitration 23-26 (1952); Oliver, The Arbitration of Labor Disputes, 83 U. of Pa. L. Rev. 206, 213-214 (1934).

[12] Letter from Secretary of Commerce, Herbert Hoover, to Senator Sterling, dated January 31, 1923. Hearing before a Subcommittee on the Committee on the Judiciary.

[13] U. S. Arbitration Act, 43 Stat. 833, re-enacted 61 Stat. 669, 9 U. S. C. Sections 1-14.

ample, Congressman Graham, Chairman of the House Committee on the Judiciary, stated in the debate on the Bill:

> " . . . This Bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in **Commercial Contracts** and Administrative contracts, in an agreement to arbitrate when voluntarily placed in the document by the party to it . . . it creates no legislation; grants no new rights, . . . t in regards to enforcing an agreement in **Commercial Contracts**" (65 Cong. Rec. [1931-1924]). (Emphasis supplied.)

In further discussing the Bill before the Subcommittee hearing, Mr. Piatt, representing the American Bar Association Committee on Commerce, Trade and Commercial Law, clearly pointed out on behalf of the draftsmen that the Bill was not intended to apply against industrial or labor disputes. He said:

> " . . . It was not the intention of this bill to make an industrial arbitration in any sense . . . and so I suggest that in as far as the Committee is concerned, if your Honorable Committee should feel that there is any danger of that, they should add to the bill the following language: 'but nothing herein contained shall apply to seamen or any class of workers in interstate or foreign commerce.' **It is not intended that this shall be an Act referring to labor disputes at all.** It is purely an Act to give the Merchants the right of the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this . . . " (Emphasis supplied.)

**(Hearing before Subcommittee on the Judiciary on S. 4213, 67th Cong.**, 4th Sess. 9 [1923].)

Thus it appears that throughout the course of the legislative progress of the U. S. Arbitration Act, both in the Hearings before the Committees of Congress and discus-

sions on the floor of Congress and whenever the pending measure was considered by labor and business alike, it was understood and agreed that the Act was not to have and was not intended to have, any application in the field of labor disputes. This was certainly the understanding of the spokesman for the organized labor movement at that time. This is clearly illustrated by the following report of the Executive Council of the American Federation of Labor in 1925:

> " . . . Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provides that 'be nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' This exempts labor from the provisions of the law although its sponsors decided that there was not any intention to include labor disputes . . . "
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> **(Proceedings of the 45th Annual Convention of the American Federation of Labor, 52 [1925].)**

During the years which followed the passage of the U. S. Arbitration Act, the American Bar Association not only recognized that the Act did not apply in the field of industrial and labor disputes, but considered that it would be desirable that a measure be drafted and enacted which would, in fact, provide for enforcement of agreements to arbitrate in labor disputes.[14]

In 1942 a bill was introduced in the Senate which sought to provide machinery for the enforcement of arbitration clauses in collective bargaining agreements.[15] The purpose

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[14] 51 A. B. A. Rep. 394 (1926). However, the measure met strong opposition from labor and in 1930 the A. B. A. Committee which had been dealing with the measure concluded that "Public opinion is not ready for this legislation" and that "it would be a mistake to press it actively at the present time." 55 A. B. A. Rep. 328 (1930).

[15] S-3250, 77th Cong., 2d Sess., 88th Cong. Rec. 2071.

of that Bill was to extend the U. S. Arbitration Act so as to have it embrace written agreements to arbitrate labor controversies. It was proposed by such Bill to provide for the same type of enforcement of arbitration agreements contained in labor agreements as was provided under the U. S. Arbitration Act for the enforcement of commercial arbitration agreements. 88 Cong. Rec. 2072. This Bill was never reported out of Committee.

Thus, the legislative history of the U. S. Arbitration Act amply supports the conclusion reached by the Court below that collective bargaining agreements are "contracts of employment" within the meaning and intent of the Arbitration Act, and as such were expressly excluded from its coverage. Such a conclusion is strongly reinforced by the recent holding of the Seventh Circuit Court in **United Steelworkers v. Galland Hemning Co.**, supra.[16]

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[16] ". . . On the issue as to whether a collective bargaining agreement constitutes a 'contract of employment' within the exception of Sec. 1, the courts again are sharply divided. Those holding in the negative place much reliance, mistakenly, we think, upon a statement in *J. I. Case Co. v. National Labor Relations Board*, 320 U. S. 332, as follows:

> " 'Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.' "

The court also stated on the following page:

> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings . . . But the terms of the employment already have been traded out. There is little left to the individual agreement except the act of hiring."

In our judgment, this statement in *Case* affords no support for the contention that the collective bargaining agreement under the

The argument advanced by the Petitioner in its Brief that grievance arbitrations under labor management con-

circumstances of the instant case should not be characterized as a contract of employment. As the court in *Case* recognized "Contract in labor law is a term the implications of which must be determined from the connection in which it appears." The circumstances there were far different from those here. There, the court was considering an unfair labor practice charge based upon the employer's refusal to bargain with the union. It sought to justify its refusal on the ground that 75% of its employees were working under individual contracts of employment and that any agreement made with the union would affect the rights of such employees under such individual contracts. The court sustained the Labor Board, which had held against the employer. Obviously, the court was not concerned with a contract of employment, not even a trade agreement of which the court speaks. The sole issue was whether the employer was obligated by law to enter into a bargaining negotiation with the union.

In contrast, we are here concerned with an arbitration provision contained in an agreement between the union and the employer which fixes and determines in great detail the rights and obligations of the parties including the employees. As to the latter, it fixes their rates of pay, hours of work and many other details in connection with their employment, such as time and a half for Saturday work, double time for certain designated holidays, premium in the hourly rate of pay under specified conditions, rest periods, time off for lunch periods, seniority rights, sick and accident benefits and vacation rights. Moreover, the rights and obligations of the employer, as well as the union are spelled out in detail.

"We assume that a mere bargaining agreement which the court was discussing in *Case* would not constitute a contract of employment, particularly in a situation where, as in that case, the employees were under individual contracts. Even so, a collective bargaining agreement entered into by a union for the benefit of employees (present or future) is a prospective contract of employment which becomes absolute at the time of hiring. The hiring merges with and becomes a part of the contract of employment, the terms and conditions of which have been determined in advance. To hold that the bargaining agreement at that time does not constitute a contract of employment is to ignore realities. It would mean that there is no contract of employment between an employer and its employees, working under the terms and conditions set forth in a collective bargaining agreement. Such a contract could only exist in a case of individual hiring where the employer and the employee were free to fix the terms and conditions of employment. . . ."

(*United Steelworkers of America, CIO, et al., v. Galland-Henning Mfg. Co.*, No. 11774); 31 Labor Cases, supra.

tracts are something which was beyond the comprehension or contemplation of Congress at the time of the enactment of the U. S. Arbitration Act is completely negative by the actual facts of legislative history. Moreover, its argument that the common law rule under which the courts have traditionally declined to enforce executory agreements to arbitrate should be rejected because of its allegedly shoddy basis completely ignores the basic differences between courts and non-judicial tribunals and their impact upon the constitutional and legal rights of litigants. Such difference was pointed out by this Court in **Bernhardt v. Polygraphic Company of America,** supra.[17]

In the light of the express refusal on the part of Congress to provide for judicial enforcement of agreements to arbitrate contained in collective bargaining contracts; and in the further light of the strong opposition which has been expressed toward such judicial action from various sources, we must disagree with Petitioner's argument that the historic rules against enforcement of arbitration agreements should now be held not to apply to collective bar-

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[17] ". . . For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in Wilko v. Swan, 346 U. S. 426, 435-438, 98 L. ed. 168, 175-177, 74 S. Ct. 182. We said in the York case that 'The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result.' 326 U. S. 103. . . ."

(*Norman C. Bernhardt v. Polygraphic Company of America, Inc.*, supra.)

gaining contracts. In any event, such argument should be addressed to Congress, since it is clearly a matter within the sphere of the legislative and not the judicial branch of Government.

We submit that the decision of the Court below that the U. S. Arbitration Act gives no basis or authority upon which a Federal Court may direct enforcement of an executory covenant to arbitrate in a collective bargaining agreement is sound and correct and should be sustained by this Court.

### III. The District Court Had No Jurisdiction to Grant the Relief Prayed for Because of Jurisdictional Limitations Contained in the Norris-LaGuardia Act.

The Court below summarily held that the Norris-LaGuardia Act, 29 U. S. C. A. 101, et seq., did not preclude the granting of the relief sought. Citing **Graham v. Brotherhood of Locomotive Firemen and Engine Men,** 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22. We submit that the Court below was incorrect on this point and that the **Graham** case relied upon by the Court below is distinguishable and not applicable in the instant case. In the **Graham** case, this Court was concerned with a matter which involved the enforcement of rights which had been created and specifically granted by Congress in the Railway Labor Act.[18] This Court held that a denial of the "sole judicial weapon" available to the Petitioners in the Graham case would "strike from labor's hands" the ability to "enforce such rights as . . . secured to them by Federal statute." 338 U. S. 232, at 237.

We point out that in the instant case the Petitioner is not seeking to enforce a specific right granted by Congress or "secured by Federal statute." As we have shown in Section I and Section II, supra, Congress has refused to

[18] 45 U. S. C. A., Sec. 151 et seq.

enact legislation providing for the enforcement of agreements to arbitrate contained in collective bargaining agreements. Congress has not said that any person or labor union or employer has a right to a particular provision in a collective bargaining agreement. Specifically, it did not grant particular rights in reference to enforcing agreements to arbitrate. We submit that it is well settled by the decisions of the Courts that cases involving breaches of collective bargaining agreements do not arise under the laws of the United States simply because such agreement may have been entered into by parties subject to some Federal Act, such as the Railway Labor Act, the National Labor Relations Act, as Amended, or the Fair Labor Standards Act.[19]

The Norris-LaGuardia Act clearly provides that no injunction may issue in a case involving or growing out of a labor dispute except in strict conformity with the express provisions of that Act.

Congress repeated the mandate contained in Section 1 of the Norris-LaGuardia Act, in Section 7 of the same Act, and then set forth in Section 7 the conditions precedent to the granting of injunctive relief in a matter defined as a "labor dispute" in Section 13 of the Act. Those conditions have not been met here, nor are they alleged to

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[19] *Schatte v. International Alliance of Theatrical Stage Employees*, 70 F. Supp. 1008 (S. D. Calif.), aff'd 165 F. 2d 216 (9th Cir.), cert. denied 334 U. S. 812; *Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees v. Southern Bus Lines, Inc.*, 189 F. 2d 219 (5th Cir.); *Starke v. New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7th Cir.); *Barnhart v. Western Maryland Ry. Co.*, 128 F. 2d 709 (4th Cir.), cert. denied 317 U. S. 671; *Burke v. Union Pacific R. Co.*, 129 F. 2d 844 (10th Cir.); *International Ladies Garment Workers Union v. Jay-Amer Co.*, 228 F. 2d 632 (5th Cir.)

See also *Shulthe's v. McDougald*, 225 U. S. 561, 569; *Gulley v. First National Bank*, 299 U. S. 109, which establish the rule that an action does not arise under a Federal law unless it in fact 'substantially involves a dispute or controversy respecting the validity, construction, or effect of such law."

have been met. Moreover, we point out that Congress recognized that the jurisdiction of various Federal Courts might at some future time be changed or redefined, and accordingly further provided in Section 13 of the Norris-LaGuardia Act that "the term 'Court of the United States' means any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia."

The prohibitions and limitations against Federal injunctions contained in the Norris-LaGuardia Act have been held applicable to injunctions not only relating to strikes, picketing, or boycotts, but also to injunctions sought against breaches of other contractual obligations, and other conduct not unlike the matter involved and relief sought in the instant matter.[20]

In 1947, when the Labor Management Relations Act was pending, Congress was well aware of the continuing prohibition against Federal Courts' granting injunctive relief in labor disputes as contained in the Norris-LaGuardia Act. Such awareness, as well as opposition to certain provisions proposed to be embodied in Section 301, was clearly expressed by the minority members of the House Committee in the Report on H. R. 3020, which characterized it as "an effort of the bill to open up the Federal Courts to Petitions for Injunction in disputes involving violations of union agreements despite the present provisions of the Norris-LaGuardia Act banning injunctions in labor disputes except after full hearing and after certain findings" (H. R. Rep. 245 on H. R. 3020, 80th Cong., 1st Sess., page 110 [1947]).

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[20] *Iceway Motor Freight, Inc., v. Keystone Freight Lines, Inc.*, 126 F. 2d 931, 10th Cir.; *East Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 163 F. 2d 10, 5th Cir.; *California Association v. The Building Trades Council*, 178 F. 2d 175, 9th Cir.; *Missouri-Kansas-Texas Railway Co. v. Randolph*, 164 F. 2d 4, 8th Cir., cert. den. 334 U. S. 818.

When the Bill originally came before the House, there was provided in Section 302 (which later became Section 301 of the Act as passed) language which expressly removed the prohibitions of the Norris-LaGuardia Act from suits brought under that Section. The House Report in this connection pointed out that:

> "... It also makes the Norris-LaGuardia Act inapplicable in suits and proceedings involving violations of contracts which labor organizations voluntarily and with their eyes open enter into ..."
>
> **(H. Rep. 245 on H. R. 3020.)**

However, when the Bill went into conference, the Report of the Conference Committee indicated that such proposed broad repeal of the Norris-LaGuardia Act had been rejected and only that portion relating to agency (Section 6) had been, or was intended to be, modified by Section 301 as recommended.[21]

The grievances in the instant case involved disputes with reference to work assignments and job duties. Thus it is unmistakably apparent that this case grows out of a "labor dispute" as defined in Section 13 (c) of the Norris-LaGuardia Act, since the controversy clearly concerns

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[21] "Section 302 (c) of the House bill made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the unlawful acts of their agents except upon clear proof of actual authorization of such acts, or ratification of such acts after actual knowledge thereof. This provision in the Norris-LaGuardia Act was made inapplicable under the House bill. Section 301 (e) of the conference agreement provides that for the purposes of Section 301 in determining whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. ..."

*(House Conference Report No. 510 on H. R. 3020.)*

"terms or conditions of employment" within the meaning of that Section of the Act. **W. L. Mead, Inc., v. International Brotherhood of Teamsters**, 217 F. 2d 6, 1st Cir.; In re **Third Avenue Transit Corp.**, 192 F. 2d 971, 2nd Cir.; **Alcoa Steamship Co., Inc., v. McMahon**, 173 F. 2d 567, 2nd Cir.

We submit further that there can be no real distinction between an injunction and an order of the Court issuing a mandate of specific performance in this matter. See also: **Shubert v. Woodward**, 167 F. 47, 52, 8th Cir.; **Independent Patrolling Workers of New Jersey v. Southern Standard Oil Co.**, 235 F. 2d 401, 3rd Cir.; **U. S. v. Kovich**, 201 F. 2d 470, 7th Cir.; and **Alcoa S. S. Co. v. McMahon**, 81 F. Supp. 541, S. D. N. Y., affirmed 173 F. 2d 567, 2nd Cir., cert. den. 338 U. S. 821.

In the light of the specific prohibitions contained in the Norris-LaGuardia Act, and in the light of the clearly expressed intent of Congress in the enactment of that Act, and of the particular consideration given by Congress to the impact of the Norris-LaGuardia Act on the Labor Management Relations Act, we submit the Norris-LaGuardia Act is in all respects applicable and that the District Court was not empowered to grant the relief prayed for in this matter by virtue of Norris-LaGuardia. As will be pointed out further in Section IV, infra, the Order of the District Court, refused and rejected by the Court below, in effect sought to extend the life of one portion of one Article of the expired Agreement between the parties up to and through the conclusion of the arbitration of the grievances directed by the District Court. In extending the life of that Section of the Agreement (Article IX), it is submitted that the District Court, to do equity, would have of necessity been required to also extend the life of the no-strike clause, a part of the same Article. The law is clear that in the circumstances here enumerated, the District Court could not have enjoined

the Union from striking, nor could it have decreed specific performance by the Union of its no-strike obligation in the expired contract. Yet both the no-strike clause and the arbitration clause here involved are part of the same Article of the Agreement, and even the Petitioner concedes in its Brief that these two matters constituted, in large part, the consideration for the mutual obligations contained in the Agreement.

To by-pass the Norris-LaGuardia Act in this connection, we submit that this Court must decide that Congress did not consider its prohibitions when it was enacting Section 301 or, if it did consider its prohibitions, it must assume that Congress did not intend for them to apply to 301. Such an assumption must, of necessity, be made in the face of the Congressional discussions and of the official Senate and House Reports which enumerate and set forth an express rejection of any intention by Congress to repeal any of the prohibitions contained in the Norris-LaGuardia Act except those expressly set forth. To accomplish this result, this Court would not only have to venture into the field of legislation, but would in effect have to reverse the legislative body, both as to its intent and its enactment in such connection. This, we are certain this Court will not do.

## IV. The Action Alleged as a Breach of Contract in the Complaint Did Not Occur Until the Contract Itself Had Fully Expired.

The final point urged by the Union in the Court below is a point which is apparent from an examination of the Record, to-wit: that the alleged incidents which are complained of as breach of the contract did not occur until after the contract had expired and at a time when the contract was no longer in existence. We submit that both at the time arbitration was discussed by the Union, and at the time the Company refused to agree to arbitrate the

disputes in this matter, there was no contract in existence providing for arbitration of grievances or disputes or obligating the Company to arbitrate. It is submitted that the contentions of the Union in the instant matter are predicated, as they were in the District Court, upon a contention that the contract between the parties under which the alleged breach arose continued beyond its agreed term and after its actual expiration date. The relief sought contemplated a unilateral extension of the binding obligations of the contract insofar as only the Company was concerned. We submit that neither the laws of Alabama nor of the United States authorize the granting of specific performance of a contract beyond its term or of an alleged obligation under it which had ceased to exist prior to the time the performance thereof was requested.

The sole purpose and effect of the arbitration provisions of the contract between the parties here before the Court was to create mutual consideration between the Company and the Union whereby the Company agreed that it would follow a specific procedure in the handling, discussion, and attempting to dispose of timely grievances brought by the Union on behalf of the employees during the life of the Agreement, and the Union, in turn, agreed that during the period such procedures were in effect, that it would not exercise, or avail itself of, its legal right to strike. See in this connection Article IX (a) and (f) of the Agreement (R. 15, 16-17).

When the contract expired as of July 3, 1954, the Company once more resumed its normal right to manage its properties and business. It was not bound or obligated to follow any particular procedure, technique, or device in handling or discussing Union or employee complaints or demands. As of that time the Company's only legal obligation in this regard was, by virtue of the terms of the National Labor Relations Act, to bargain collectively with the Union as the collective bargaining agent of its employees

over matters concerning wages, hours, and working conditions. The obligation to bargain over these matters has been construed to include bargaining over grievances. Such obligation to bargain, however, as contained in the Labor Management Relations Act does not carry with it, inherently or otherwise, any requirement that such bargaining over wages, hours, and working conditions, including grievances, must terminate in final and binding arbitration. The Union likewise under the terms of the Labor Management Relations Act was under a legal obligation to bargain in good faith. Such obligation to bargain on the part of the Union did not inherently, or otherwise, carry with it any prohibition against the Union's calling a strike if it was dissatisfied with the results of the bargaining or the Company's response to its demands, complaints, or requests. Both the Company and the Union during the life of the contract, contracted for a limitation of their inherent rights as set forth in the terms of the Agreement. However, when the agreement by its own terms ceased to be in effect, these limitations on the rights of both the Company and the Union simply passed out of existence, and were no longer binding.

As of July 3, 1954 the Union in the instant matter resumed its normal right to resort to the use of economic action or strike over any matter of wages, hours, or working conditions or grievances with which it was dissatisfied or upon which it could not reach an agreement with the Company through the collective bargaining processes. The Company likewise regained its right to take such position as it deemed appropriate as to these matters, even though such position might create an impasse in bargaining. The arbitration provisions of the Agreement were a direct concomitant of the no-strike provisions. When the Agreement terminated, the no-strike provisions and the arbitration provisions both likewise terminated. See **Paterson Parchment Paper Company v. IBEW**, 191 F. 2d 252, 3rd Cir.

While the District Court attempted, by its decree, to extend the Company's obligations under the contract beyond its term by issuing a mandate decreeing that the arbitration provisions of the expired contract were to be carried out by the Company, the District Court obviously was powerless, by virtue of the limitations of the Norris-LaGuardia Act, to issue a decree binding the Union to comply with or observe the no-strike clause.

The Court below did not reach the issue as to the effect of such termination of the contract on the instant controversy since it reversed the District Court on other grounds. It reserved such matter for further consideration if necessary.[22]

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[22] ". . . In the determination of the case before us it was held that since the grievances arose while the collective bargaining agreement was in effect, the Employer was required to arbitrate such grievance subsequent to the termination date of the agreement. Although unwilling to adopt the most recent conclusions of the Third Circuit in construing the United States Arbitration Act, we are impressed by its views with respect to the effect of the termination of a collective bargaining agreement upon Section 301 procedure. After reciting the giving of notice of termination and the failure of negotiations toward a new contract between an employer and a union, the court said:

> "'The old contract thereupon terminated pursuant to the permitted election already made manifest by timely notice as provided in the document itself. The obligation not to strike, like the other obligations of the contract ceased to exist. For this reason, the complaint was properly dismissed. *Paterson Parchment Paper Co. v. International Brotherhood*, 3d Cir., 1951, 191 F. 2d 252.'

"Finding as we do that compliance with a covenant for arbitration in a collective bargaining agreement will not be compelled by a Federal Court judgment where the courts of the state would deny such relief, it follows that there was no enforceable right which could have been either retained or lost upon the termination of the agreement. Hence we need not and do not decide whether such a covenant would survive where, under the applicable law, such a provision might have been enforced during the term of the agreement."

(*Lincoln Mills of Alabama v. TWUA*, R. 54-55.)

It is therefore submitted that independently of other grounds set forth in Sections I, II, and III of this Brief, the fact that the contract between the Union and Company had expired prior to the demand for arbitration by the Union and prior to the refusal to arbitrate by the Company precludes a finding that there was a breach of contract here which warranted any of the relief sought by the Petitioner in the District Court even if such relief was within the powers of the District Court. What was complained of in the District Court was not a simple breach of an executory contract, it was in fact an alleged breach of an expired contract, which alleged breach occurred after any obligations to comply with the terms of the Agreement had ceased to exist by virtue of the prior expiration of the entire Agreement.

## CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the Judgment of the Court of Appeals for the Fifth Circuit dismissing the Petition in the instant matter should be affirmed by this Court.

Respectfully submitted,

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## APPENDIX.

### STATUTES INVOLVED.

**Labor Management Relations Act, 1947**, 61 Stat. 136, 29 U. S. C., Sec. 141 et seq.:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Sec. 8 (a) (5). It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"Sec. 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . "

**Labor Management Relations Act, 1947**, 61 Stat. 156, 29 U. S. C., § 185:

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees

in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of action and proceeding by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

**United States Arbitration Act**, 43 Stat. 883, re-enacted 61 Stat. 669, 9 U. S. C., §§ 1-14, as amended by Act of September 3, 1954, 68 Stat. 1233:

**"Maritime transactions" and "commerce" defined; exceptions to operation of title.**

Sec. 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

**Validity, Irrevocability, and Enforcement of Agreements to Arbitrate**

Sec. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination.**

Sec. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find

that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

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Sec. 8. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

**Norris-LaGuardia Act**, 47 Stat. 70, 29 U. S. C., Sec. 101, et seq.:

Sec. 1. No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect

complainant's property: **Provided, however**, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 13. (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or

concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.